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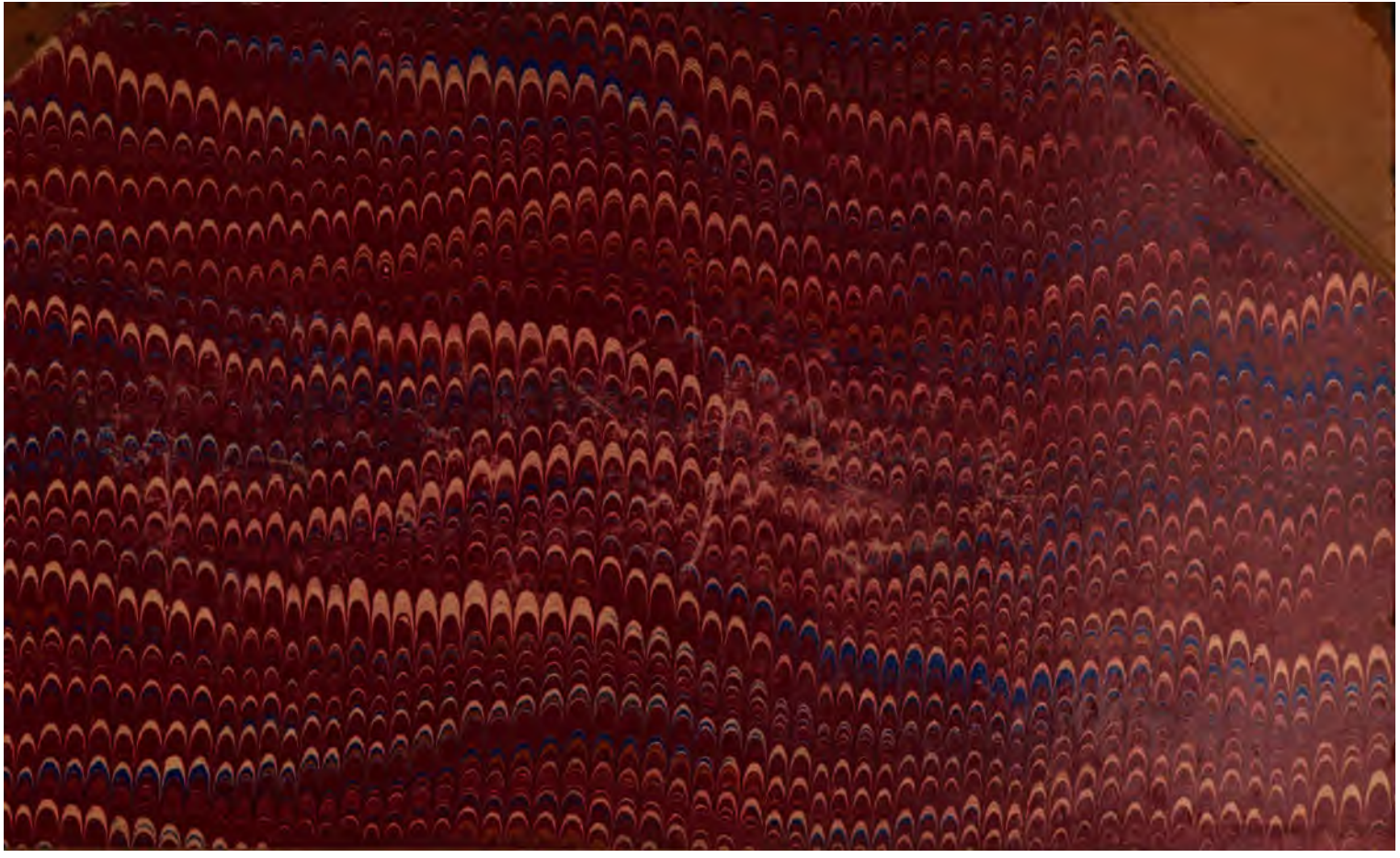

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CASES DECIDED

ON THE

BRITISH NORTH AMERICA ACT, 1867.

CASES DECIDED

ON THE

BRITISH NORTH AMERICA ACT, 1867,

IN

THE PRIVY COUNCIL, THE SUPREME COURT OF CANADA, AND THE PROVINCIAL COURTS.

COLLECTED AND EDITED BY

JOHN R. CARTWRIGHT, OF OSGOODE HALL, ESQUIRE,

Barrister-at-Law, and Law Clerk to the Legislative Assembly of Ontario.

VOL. II.

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PREFACE.

THE present volume contains the reported cases in the Court of Queen's Bench and the Superior and other Courts of Quebec, and in the Supreme Courts of Nova Scotia and New Brunswick. It also contains the cases in the Privy Council, the Supreme Court of Canada, and the Superior Courts of Ontario, published since June, 1882.

Some important cases not having as yet been finally disposed of are reserved for a future volume.

The method of arrangement adopted in the former volume has been retained.

The head notes have in all cases been revised or re-written.

As in the case of the former volume, where any part of a judgment has been omitted, the omission has been marked by asterisks or otherwise; the omissions being such matters only as do not affect the constitutional points. Square brackets, thus [ ], shew that the words placed within them are introduced by the editor.

The quotations and references in the various judgments have, as far as possible, been verified and corrected.

The case of *Smith* v. *The Merchants' Bank*, Vol. I., p. 828, has been reversed by the Ontario Court of Appeal on grounds which do not affect the constitutional question, though some of the Appeal Judges expressed disapproval of the decision as to that point. The judgment of the Court of Appeal is not yet reported, and the case has been carried to the Supreme Court of Canada, and now stands for judgment.

The editor will be glad to have his attention called to any cases on the construction of the B. N. A. Act which he may have overlooked.

June, 1883.

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A LIST OF THE CANADIAN REPORTS

SINCE 1867.

ABBREVIATIONS.	NAME OF REPORT.
Can. S. C. R.	Supreme Court of Canada.
....	Dorion's Quebec Appeals—Queen's Bench, Quebec, Appeal side.
Grant	Grant's Chancery Reports, Ontario.
Hannay	Hannay—Supreme Court of New Brunswick.
L. C. J	Lower Canada Jurist.
L. N.	*Legal News*, Quebec.
Ont. App. *or* App. Rep ..	Court of Appeal of Ontario.
Ont. Rep	High Court of Justice of Ontario.
Pr. Rep	Ontario Practice Reports.
Pug	Pugsley—Supreme Court of New Brunswick.
Pug. & B	Pugsley & Burbidge—Supreme Court of New Brunswick.
Q. L. R	Quebec Law Reports.
Rev. Leg	*Revue Legale*, Quebec.
R. & C	Russell & Chesley—Supreme Court of Nova Scotia.
R. & G	Russell & Geldert— " " "
Stephens' Dig	Stephens' Digest, Quebec.
Stevens' Dig	Stevens' Digest, New Brunswick.
U. C. C. P	Common Pleas, Ontario.
U. C. Q. B	Queen's Bench, "

CASES DECIDED

ON THE

BRITISH NORTH AMERICA ACT, 1867.

PRIVY COUNCIL.

JOSEPH THÉBERGE AND ANOTHER.....*Appellants*,

AND

PHILLIPPE LANDRY .....*Respondent*.

J. C.*
1876.
Nov. 7.

On Appeal from the Superior Court for the Province of Quebec, Canada.

[*Reported 2 App. Cas. 102.*]

Quebec Controverted Elections Act, 1875—Royal Prerogative as to admitting Appeal.

The Petitioner having been declared duly elected a member to represent the electoral district of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council :—

Held, that such application must be refused.

Although the prerogative of the Crown cannot in general be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be sus-

*Present :—THE LORD CHANCELLOR (LORD CAIRNS), SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, AND SIR HENRY KEATING.

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ceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the Act was held to be that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative; and the Act having been assented to on the part of the Crown, and the Crown being therefore a party to it, there was held to be no prerogative right to admit an appeal contrary to the intention of the Act.

This was a petition by Philippe Landry, above-named, for special leave to appeal from a judgment of a majority of the Superior Court for the Province of Quebec, Routhier, C. J., dissenting, dated the 29th of May, 1876, which found, on a petition presented by the above-named Joseph Théberge and another, under the Quebec Controverted Elections Act, 1875, that he as a candidate had been guilty of corrupt practices, both by himself and his agents, at an election held in July, 1875, of a member to represent the electoral district of Montmanier in the Legislative Assembly of the Province of Quebec, declared the seat so obtained by him to be vacant, and condemned him in costs.

This petition submitted that in each of four instances in which the corrupt practices alleged had been held to be proved—two by the candidate himself and two by his agents—the judgment of the majority of the Superior Court was erroneous in law and unsupported in fact, and that the judgment of the Chief Justice was correct; that by the Consolidated Statutes of Lower Canada, an appeal lies to the Court of Queen's Bench in all cases where the sum in dispute exceeds the sum of £20 sterling, or relates to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents, or to such like matters or things where the rights in future might be

bound, although the immediate value or sum in appeal is less than £20 sterling; but that by the Quebec Controverted Elections Act (38 Vict. c. 8, Quebec Statutes), s. 90, it was provided "that the judgment of the Superior Court in such cases shall not be susceptible of appeal." The petitioner further stated that the Superior Court, on the 27th of June, 1876, had rejected his motion for leave to appeal to Her Majesty, but he submitted that the question of law involved in the said four cases, and especially in the two which involved his personal disability, were of the highest and most general importance, while the consequences to himself of the said judgment were most serious.

Mr. *Benjamin*, Q.C. (Mr. *Bompas* with him), for the petitioner, as to the right of appeal, or the power to grant special leave to appeal, referred to the Act of the Imperial Parliament 7 and 8 Vict. c. 69, and to *Boston* v. *Lelièvre* (1), to Consolidated Statutes of Lower Canada, c. 88, s. 17, and to Quebec Controverted Elections Act, 1875, ss. 89 and 90, and the Act of 1872, repealed thereby. Although, under s. 90 of the Quebec Controverted Elections Act (38 Vict. c. 8), it is provided that the judgment of the Superior Court under that Act should not be susceptible of appeal, yet such provision is inconsistent with or repugnant to s. 92 of the B. N. A. Act, 1867, (Imperial Parliament, 30 and 31 Vict. c. 3), inasmuch as it is on the proper construction of the Imperial Act *ultra vires* of the Provincial Legislature of Quebec to take away the right of appeal. When the Provincial Legislature deals with the local tribunals, it says that the Court of Review shall pass the final judgment. But the Crown is nowhere alluded to, and the right of appeal to the Crown on the one hand, and the prerogative of

(1) L. R. 3 P. C. 157, 164.

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the Crown on the other, to grant special leave to appeal to the Privy Council are not taken away. It is, moreover, expressly provided by the above-mentioned Imperial Act of 1867, which empowers the Colonial Legislatures to legislate, that they shall not interfere with Imperial statutes. (The Lord Chancellor referred to *Cuvillier* v. *Aylwin* (1).) That case has been subsequently overruled. (The Lord Chancellor:—It has frequently been referred to, but I am not at all aware that it has been overruled. There is, moreover, a case in 1862. *In re Marois* (2).) But see *Sauvageau* v. *Gauthier* (3).

Again, the Colonial Act provides, first, in reference to the loss of the seat; second, for punishment for corruption: see Quebec Controverted Elections Act, 1875, ss. 267 and 268. But on referring to B. N. A. Act, 1867 (30 and 31 Vict. c. 3), s. 91 and s. 84, it appears that the Quebec Legislature has no power to pass any provision relating to qualification or disqualification except that bestowed by s. 84. It is therefore *ultra vires* of the Provincial Legislature to provide disqualification and other punishment for corrupt practices. The Provincial Legislature, in fact, is prohibited from criminal legislation, even in regard to criminal procedure. (The Lord Chancellor:—The Judge has said nothing about disqualification in his judgment; he leaves the consequences of his judgment to be governed by the Act, which, according to you, is inoperative in that respect, as being *ultra vires* the Legislature.)

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Lord Cairns):—

The petitioner in this case states that he was a candidate at an election held in July, 1875, in the Province of

(1) 2 Knapp's P. C. C. 72. (2) 15 Moo., P.C.C. 189.
(3) L. R. 5 P. C. 494. See *Cushing* v. *Dupuy*, 5 App. Cas. 409.]

Quebec, for the office of member to represent the electoral district of Montmanier in the Legislative Assembly of the Province, and that he was declared duly elected; but that after the election a petition was presented by certain electors against the return of the petitioner, alleging that he had been guilty of corrupt practices by himself and his agents, and praying that the seat might be declared vacant, and the petitioner declared disqualified, in accordance with the provisions of the Quebec Controverted Elections Act. He then states that the petition was tried, according to the Act, before the Court, and that the Court pronounced a sentence against the petitioner, declaring the election null and void, and declaring him guilty of corrupt practices, both personally and by his agents. The petition states certain objections which the petitioner makes to the decision of the Court, and prays that Her Majesty in Council will be graciously pleased to order that the petitioner shall have special leave to appeal from the judgment of the Superior Court for the Province of Quebec of the 29th of May, 1875 — that is to say, from the judgment declaring the election of the petitioner to be null and void.

The Act of Parliament in question is the Quebec Controverted Elections Act of the year 1875. That Act repealed an Act of the Quebec Legislature of the 36th year of Her Majesty's reign—that is, in 1872—which was intituled "An Act to provide for the Decision of Controverted Elections by the Judges, and to make better Provision for the Prevention of Corrupt Practices at Elections." That Act of 1872 appears to have been the Act which, in Quebec, transferred to the Court the decision of controverted elections, which before that time was vested in or was retained in its own hands by the Legislative Assembly of the Province. By the force of the two Acts of 1872 and 1875, in Quebec, as in this country, the de-

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cision of questions of that kind has now become vested in the Supreme Court. The 89th sec. of the later of these two Acts, the Act of 1875, provides that the Superior Court sitting in review shall determine: first, whether the member whose election or return is complained of has been duly elected or declared elected; second, whether any other person, and who, has been duly elected; third, whether the election was void; and fourth, all other matters arising out of the petition, or requiring its determination. Then the 90th section enacts, "Such judgment shall not be susceptible of appeal."

Now, upon that 90th section it is contended on behalf of the petitioner that it does not take away any prerogative right of the Crown; that the Crown and the prerogative of the Crown are not specially or particularly mentioned; and that the general rule is, that the prerogative of the Crown cannot be taken away except by a specific enactment. It is said that this section may be satisfied by holding that the intention of the Legislature was, that there should be no appeal from a Superior Court to the Court of Queen's Bench in the colony, which was the kind of appeal that existed in civil cases in the colony, and that the prerogative of the Crown is not in any way affected.

Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shewn to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts

constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very particular jurisdiction which up to that time had existed in the Legislative Assembly, of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known. Accordingly we find, on looking at the Act of Parliament, that after providing by the 89th section as to the matters which the Superior Court is authorized to determine, the 91st section declares that a certified copy of the judgment shall be transmitted without delay to the Speaker, and then to the prothonotary in the district in which the petition was presented, and then the 118th section provides:—"The Speaker shall, at the earliest practical moment after having received the judgments and reports, adopt all the proceedings necessary for confirming or altering the return of the returning officer, or for the issuing of a new writ for a new election within thirty days, or for otherwise carrying the final judgment into execution as circumstances may require. He may, for the issuing of such writ of election, address his warrant under hand and seal to the Clerk of the Crown in Chancery." Then the 119th section is:—"The Speaker shall without delay communicate to the Legislative Assembly the judgments and the reports received, and his own pro-

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ceedings thereon." And the 120th section is:—"When a special report has been received, the Legislative Assembly may make such order in respect of such special report as it may deem proper." The whole scheme, therefore, of the Act of Parliament is that, once the action of the Superior Court takes place, and the decision of the Superior Court arrived at, the machinery is to go on just as it had formerly gone on inside the Legislative Assembly;—writs are to be issued, seats are to be taken, other proceedings are to be had as would have been the case before the Court was called into operation, and when the Legislative Assembly decided these matters by its own authority.

Stopping there, it would be very difficult to do otherwise than conclude, from the character of these enactments, that the object which the Legislature had in view was to have a decision of the Superior Court, which, once arrived at, should be for all purposes conclusive.

But there is a further consideration which arises upon this Act. If the judgment of the Superior Court should not be conclusive, of course the argument is that the power which is to be brought to bear to review the judgment is the power of the Crown in Council.

Now, the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. These rights and privileges have always, in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation,

if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place.

These are considerations which lead their Lordships not in any way to infringe, which they would be far from doing, upon the general principle that the prerogative of the Crown, once established, cannot be taken away, except by express words; but to consider with anxiety whether in the scheme of this legislation it ever was intended to create a tribunal which should have, as one of its incidents, the liability to be reviewed by the Crown under its prerogative. In other words, their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown. In the opinion of their Lordships, adverting to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the Legislature under this Act,—an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party,—to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

In the opinion, therefore, of their Lordships, there is

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not in this case, adverting to the peculiar character of the enactment, the prerogative right to admit an appeal, and therefore the petition must be refused.

It is, of course, in this view of the case, unnecessary to consider whether, if there had been a right to admit an appeal, it would have been a case in which, in the discretion of this tribunal, an appeal should be admitted. On that point their Lordships have never entertained any shadow of doubt. They clearly are of opinion that, even if there was the power of admitting an appeal, this is not a case in which an appeal ought to be admitted; but, in their opinion, it is not a case in which it was ever contemplated or intended that there should be a power to admit an appeal on the part of the Legislature.

Their Lordships were in one part of Mr. *Benjamin's* argument pressed with another matter, that even if an appeal should not be here admitted generally, yet that there was in the finding of the Judge a subordinate part, which ought to be brought by way of review before this tribunal. Mr. *Benjamin* said that the Judge had found that the petitioner was personally guilty of corrupt practices; and then he said that the Quebec Election Act, by a particular section, the 267th, provided that if it is proved before the Court that corrupt practices have been committed by or with the actual knowledge or consent of any candidate, not only the election shall be void, but the candidate shall, during the seven years next after the date of such decision, be incapable of being elected to and of sitting in the Legislative Assembly, of voting at any election of a member of the House, or holding an office in the nomination of the Council of the Lieutenant-Governor of the Province. Mr. *Benjamin* contended that the Act of Parliament, so far as it engrafted on the decision of the Judge this declaration of incapacity, was *ultra vires* the power of the Legislature of the Province. Upon that

point their Lordships do not think it necessary to express any opinion whatever. If the Act of Parliament was in this respect, as contended, *ultra vires* the Provincial Legislature, the only result will be that the consequence declared by this section of the Act of Parliament will not enure against and will not affect the petitioner; but it is not a subject which should lead to any different determination with regard to that part of the case.

Upon the whole, their Lordships will humbly advise Her Majesty that this petition be dismissed.

PRIVY COUNCIL.

J. C.*
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May 2, 3;
June 23.

CHARLES RUSSELL *v.* THE QUEEN.

On appeal from the Supreme Court of New Brunswick.

[*Reported 46 L. T. (N. S.) 889.*]

Canada Temperance Act, 1878—Powers of the Dominion Parliament.

An Act of the Parliament of Canada prohibited the traffic in intoxicating liquors, except under certain restrictions, in any county or city the inhabitants of which chose to take the steps therein prescribed for the adoption of its provisions :—

Held by the Privy Council that such an Act was within the jurisdiction of the Dominion Parliament.

This was an appeal from a decision of the Supreme Court of the Province of New Brunswick discharging a rule *nisi* calling upon John L. Marsh, Esq., police magistrate in and for the City of Fredericton, and John Woodward, upon whose information and complaint the conviction thereinafter mentioned was made, to shew cause why a writ of *certiorari* should not be issued to remove into the said court a conviction made before the said police magistrate on the 25th January, 1881, against the appellant, for that he did between the 1st and 7th days of January, 1881, at the City of Fredericton, in the County of York, unlawfully sell, barter and dispose of intoxicating liquors contrary to the 2nd part of the Canada Temperance Act, 1878 (41 Vict. c. 16, s. 99), and all proceedings upon which the said conviction is based, with a view to the same being quashed.

* Present :—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, and SIR RICHARD COUCH.

The offence was proved. No evidence was called for the defence. The only defence offered was an objection to the jurisdiction of the magistrate on the sole ground that the law under which the proceedings were had, namely, the Canada Temperance Act, 1878, is *ultra vires*. This objection was overruled by the magistrate.

Thereupon a rule *nisi* was obtained to remove the conviction by *certiorari* into the Supreme Court to be quashed. The only objection to the conviction raised before the Supreme Court was, that the said Act was *ultra vires*, the matter being entirely within the powers of the Local Legislature under the 92nd section of the B. N. A. Act.

After argument the Supreme Court discharged the rule, considering themselves bound by the decision of the Supreme Court of Canada, reversing the decision of the Supreme Court of New Brunswick in the case of *Reg.* v. *The Mayor of Fredericton*, and holding that the Canada Temperance Act, 1878, is not *ultra vires*. In the last mentioned case the Supreme Court of New Brunswick held (Palmer, J. *diss.*) that the said Act was *ultra vires*. The judgment of the Supreme Court of Canada reversing that decision (Henry, J. *diss.*) is reported in 3 Can. S.C.R. 505; *post*, p. 27.

The appellant thereupon petitioned Her Majesty in Council for special leave to appeal, and, by Order in Council, dated the 18th day of May, 1881, leave was given accordingly.

Mr. *Benjamin*, Q.C., and Mr. *R. Brown* for the appellant.

Mr. *J. J. Maclaren*, Q. C. (of the Canadian Bar), and Mr. *Fullarton* for the respondent.

The arguments appear sufficiently from the judgment of their Lordships.

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At the conclusion of the arguments their Lordships took time to consider their judgments.

June 23rd. Their Lordships gave judgment as follows:—

This is an appeal from an order of the Supreme Court of the Province of New Brunswick, discharging a rule *nisi* which had been granted on the application of the appellant for a *certiorari* to remove a conviction made by the police magistrate of the city of Fredericton against him, for unlawfully selling intoxicating liquors, contrary to the provisions of the Canada Temperance Act, 1878 (41 Vict. c. 16, Canada).

No question has been raised as to the sufficiency of the conviction, supposing the above-mentioned statute is a valid legislative Act of the Parliament of Canada. The only objection made to the conviction in the Supreme Court of New Brunswick, and in the appeal to Her Majesty in Council, is that, having regard to the provisions of the B. N. A. Act, 1867, relating to the distribution of legislative powers, it was not competent for the Parliament of Canada to pass the Act in question.

The Supreme Court of New Brunswick made the order now appealed from in deference to a judgment of the Supreme Court of Canada in the case of *The City of Fredericton* v. *The Queen*. In that case the question of the validity of the Canada Temperance Act, 1878, though in another shape, directly arose, and the Supreme Court of New Brunswick, consisting of six judges, then decided, Mr. Justice Palmer dissenting, that the Act was beyond the competency of the Dominion Parliament (1). On the appeal of the city of Fredericton, this judgment was reversed by the Supreme Court of Canada, which held, Mr. Justice Henry dissenting, that the Act was valid (2).

(1) 3 Pug. & B. 139.

(2) 3 Sup. C. R. 505; *post*, p. 27.

The present appeal to Her Majesty is brought, in effect, to review the last-mentioned decision.

The preamble of the Act in question states that "it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors." The Act is divided into three parts. The first relates to "proceedings for bringing the second part of this Act into force;" the second, to "prohibition of traffic in intoxicating liquors;" and the third, to "penalties and prosecutions for offences against the second part."

The mode of bringing the second part of the Act into force, stating it succinctly, is as follows:—On a petition to the Governor in Council, signed by no less than one-fourth in number of the electors of any county or city in the Dominion, qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such county or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General, after certain prescribed notices and evidence, may issue a proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption. When any petition has been adopted by the electors of the county or city named in it, the Governor-General in Council may, after the expiration of sixty days from the day on which the petition was adopted, by Order in Council published in the *Gazette*, declare that the second part of the Act shall be in force and take effect in such county or city, and the same is then to become of force and take effect accordingly. Such Order in Council is not to be revoked for three years, and only on like petition and procedure.

The most important of the prohibitory enactments contained in the second part of the Act is section 99,

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which enacts that "from the day on which this part of this Act comes into force and takes effect in any county or city, and for so long thereafter as the same continues in force therein, no person, unless it be for exclusively sacramental or medicinal purposes, or for *bona fide* use in some art, trade, or manufacture, under the regulation contained in the fourth sub-section of this section, or as hereinafter authorized by one of the four next sub-sections of this section, shall, within such county or city, by himself, his clerk, servant, or agent, expose or keep for sale, or directly or indirectly, on any pretence or upon any device, sell or barter, or in consideration of the purchase of any other property give, to any other person, any spirituous or other intoxicating liquors, or any mixed liquor, capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating."

Sub-section 2 provides that "neither any license issued to any distiller or brewer" (and after enumerating other licenses), "nor yet any other description of license whatever, shall in any wise avail to render legal any act done in violation of this section."

Sub-section 3 provides for the sale of wine for sacramental purposes, and sub-section 4 for the sale of intoxicating liquors for medicinal and manufacturing purposes, these sales being made subject to prescribed conditions.

Other sub-sections provide that producers of cider, and distillers and brewers, may sell liquors of their own manufacture in certain quantities, which may be termed wholesale quantities, or for export, subject to prescribed conditions, and there are provisions of a like nature with respect to vine-growing companies and manufacturers of native wines.

The third part of the Act enacts (section 100) that whoever exposes for sale, or sells intoxicating liquors, in

violation of the second part of the Act, should be liable, on summary conviction, to a penalty of not less than fifty dollars for the first offence, and not less than one hundred dollars for the second offence, and to be imprisoned for a term not exceeding two months for the third and every subsequent offence: all intoxicating liquors in respect to which any such offence has been committed, to be forfeited.

The effect of the Act, when brought into force in any county or town within the Dominion, is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibition and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment.

It was in the first place contended, though not very strongly relied on, by the appellant's counsel, that assuming the Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties and cities. The short answer to this objection is, that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition, and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and

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the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of *Reg.* v. *Burah* (1), lately before this Board.

The general question of the competency of the Dominion Parliament to pass the Act depends on the construction of the 91st and 92nd sections of the B. N. A. Act. 1867, which are found in Part VI. of the statute, under the heading "Distribution of Legislative Powers."

The 91st section enacts: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated." Then after the enumeration of twenty-nine classes of subjects, the section contains the following words:— "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

The general scheme of the B. N. A. Act with regard to the distribution of legislative powers, and the general scope and effect of sections 91 and 92, and their relation

(1) 3 App. Cas. 889.

to each other, were fully considered and commented on by this Board in the case of the *Citizens' Insurance Co.* v. *Parsons* (1). According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in section 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not, by its general power "to make laws for the peace, order, and good government of Canada," full legislative authority to pass it.

Three classes of subjects enumerated in section 92 were referred to, under each of which, it was contended by the appellant's counsel, the present legislation fell. These were:—

"9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes."

"13. Property and civil rights in the Province."

"16. Generally all matters of a merely local or private nature in the Province."

With regard to the first of these classes, No. 9, it is to be observed that the power of granting licenses is not assigned to the Provincial Legislatures for the purpose

(1) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

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of regulating trade, but "in order to the raising of a revenue for provincial, local or municipal purposes."

The Act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to destroy or diminish revenue; indeed it was a main objection to the Act that in the city of Fredericton it did in point of fact diminish the sources of municipal revenue. It is evident, therefore, that the matter of the Act is not within the class of subject No. 9, and consequently that it could not have been passed by the Provincial Legislature by virtue of any authority conferred upon it by that sub-section.

It appears that by statutes of the Province of New Brunswick, authority has been conferred upon the municipality of Fredericton to raise money for municipal purposes by granting licenses of the nature of those described in No. 9 of section 92, and that licenses granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was contended by the appellant's counsel, and it was their main argument on this part of the case, that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the Provincial Legislature. But, supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion Parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subject described in No. 9, that sub-section can in no way interfere with the general authority of the Parliament to deal with that matter. If the argument of the appellant, that the power given to the Provincial Legislatures to raise a revenue by licenses prevents the

Dominion Parliament from legislating with regard to any article or commodity which was or might be covered by such licenses were to prevail, the consequence would be that laws which might be necessary for the public good or the public safety could not be enacted at all. Suppose it were deemed to be necessary or expedient for the national safety, or for political reasons, to prohibit the sale of arms, or the carrying of arms, it could not be contended that a Provincial Legislature would have authority, by virtue of sub-section 9 (which alone is now under discussion), to pass any such law, nor, if the appellant's argument were to prevail would the Dominion Parliament be competent to pass it, since such a law would interfere prejudicially with the revenue derived from licenses granted under the authority of the Provincial Legislature for the sale or the carrying of arms. Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence. It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under sub-section 9, is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion. It is to be observed that the express provision of the Act in question, that no licenses shall avail to render legal any act done in violation of it, is only the expression, inserted probably from abundant caution, of what would be necessarily implied from the legislation itself, assuming it to be valid.

Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects "Property and Civil Rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous

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drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety and morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of

civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

It was said in the course of the judgment of this Board in the case of the *Citizens' Insurance Company of Canada* v. *Parsons*, that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. Few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects "Property and Civil Rights" within the meaning of sub-section 13.

It was argued by Mr. *Benjamin* that if the Act related to criminal law, it was Provincial criminal law, and he referred to sub-section 15 of section 92, viz.: "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." No doubt this argument would be well founded if the principal matter of the Act

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could be brought within any of these classes of subjects; but as far as they have yet gone, their Lordships fail to see that this has been done.

It was lastly contended that the Act fell within sub-section 16 of section 92—"Generally all matters of a merely local or private nature in the Province."

It was not, of course, contended for the appellant that the Legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the Provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion, to take effect at the same time throughout the whole Dominion. Their Lordships understand the contention to be that, at least in the absence of a general law of the Parliament of Canada, the Provinces might have passed a local law of a like kind, each for its own Province, and that, as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, or, as it was said, "by local option," the legislation was in effect, and on its face, upon a matter of a merely local nature. The judgment of Allen, C. J., delivered in the Supreme Court of the Province of New Brunswick, in the case of *Barker* v. *The City of Fredericton* (1), which was adverse to the validity of the Act in question, appears to have been founded upon this view of its enactments. The learned Chief Justice says:—"Had this Act prohibited the sale of liquor, instead of merely restricting and regulating it, I should have had no doubt about the power of the Parliament to pass such an Act; but I think an Act which in effect authorizes the inhabitants of each town or parish to regulate the sale of liquor, and to direct for whom, for what purposes, and under what

(1) 3 Pug. & B. 139.

conditions spirituous liquors may be sold therein, deals with matters of a merely local nature, which, by the terms of the 16th sub-section of section 92 of the B. N. A. Act, are within the exclusive control of the Local Legislature."

Their Lordships cannot concur in this view. The declared object of Parliament in passing this Act is that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance, as desirable in one Province more than in another, but as desirable everywhere throughout the Dominion. The Act, as soon as it was passed, became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it It is true that the prohibitory and penal parts of the Act are only to come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application of these parts of the Act does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion.

The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local, or exists only in one Province, and that Parliament, under colour

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of general legislation, is dealing with a Provincial matter only. It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localises the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle, that a public officer should proclaim in what districts it should come into effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character.

Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in section 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, "the regulation of trade and commerce," enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada.

In the result, their Lordships will humbly recommend Her Majesty to affirm the judgment of the Supreme Court of Canada, and with costs.

Judgment affirmed.

JUDGMENTS IN THE SUPREME COURT OF CANADA (*in the case of the City of Fredericton* v. *The Queen, from which the case of Russell* v. *The Queen was virtually an appeal*).

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[*Reported 3 Can. S. C. R. 505.*]

RITCHIE, C. J. :—

This is an appeal from the judgment of the Supreme Court of New Brunswick, quashing a return to a mandamus *nisi*, and ordering a peremptory mandamus to be issued in this cause.

The Supreme Court of New Brunswick, by writ of mandamus *nisi*, commanded the appellants to grant a license to Thomas Barker, to sell spirituous liquors by retail within the city of Fredericton, in the hotel occupied by him in that city. The appellants returned to this writ that they refused and still did refuse to grant such license, "for the following reasons to the contrary, viz. :—The Canada Temperance Act of 1878 was declared in force in the said city of Fredericton, on the first day of May last, and therefore the City Council could not grant a license to the said Thomas Barker to sell spirituous liquors by retail, contrary to the provisions of that Act."

The Supreme Court, upon reading the mandamus *nisi*, the said return, and upon hearing counsel of the respective parties, made an order that the said return be quashed, and that a peremptory mandamus be issued.

The present appeal is from the order so made.

The respondent contends that the return is sufficient, and that the order for the issue of a peremptory writ of mandamus should be affirmed, on the ground that the Canada Temperance Act of 1878 is *ultra vires* the Parliament of Canada ; and this is the only point submitted for our consideration.

The Act in question is entitled "An Act respecting the Traffic in Intoxicating Liquors," and the preamble sets forth that—"Whereas it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors :

"Therefore Her Majesty, etc., enacts, etc."

After several preliminary sections, the first of which declares that "this Act may be cited as 'The Canada Temperance Act, 1878,'" and the second defines the meaning of the expression "intoxicating liquors," and others, not pertinent to the question now to be discussed, the Act is divided into three parts. The first provides for

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"Proceedings for bringing the second part into force;" and the second provides for the "Prohibition of traffic in intoxicating liquors;" and the third for "Penalties and prosecutions for offences against the second part."

The preliminary proceedings necessary to be taken, before the Act can come into operation, are to be commenced by a petition to the Governor in Council, praying that the second part of the Act shall be in force and take effect in the county or city named, and that the votes of the electors be taken for and against the adoption of the petition, and such petition is to be embodied in a notice to the Secretary of State, signed by electors qualified and competent to vote at the election of a member of the House of Commons, in the county or city, to the effect that the signers desire that the votes of all such electors be taken for and against the adoption of the petition; and that together with, or in addition to, every such notice, there shall be laid before the Secretary of State evidence that there are appended to it the genuine signatures of at least one-fourth in number of all the electors in the county or city named in it, and that such notice has been deposited in the office of the Sheriff, or Registrar of Deeds, of or in the county or city, for public examination by any parties, for ten days preceding its being laid before the Secretary of State; and that two weeks' previous notice of such deposit had been given in two newspapers published in or nearest to the county or city, and by at least two insertions in each paper; and in case it appears, to the satisfaction of the Governor-General in Council, that such notice has appended to it the genuine signatures of one-fourth, etc., and has been duly deposited, etc., His Excellency may issue a proclamation under this part of this Act.

The Act then prescribes what is to be set forth in the proclamation, and makes provisions, special and general, for the holding of a poll for taking the votes of the electors for and against the petition, with numerous other provisions in connection therewith for securing a fair and honest vote, and for the prevention of corrupt practices, etc., etc.

The 96th section provides that—"When any petition embodied as aforesaid in any notice and in any proclamation under this the first part of this Act has been adopted by the electors of the county or city named therein, and to which the same relates, the Governor-General in Council may, at any time after the expiration of sixty days from the day on which the same

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was adopted, by Order in Council published in the *Canada Gazette*, declare that the second part of this Act shall be in force and take effect in such county or city upon, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire; provided such day be not less than ninety days from the day of the date of such Order in Council; and if it be less, then on the like day in the then following year; and upon, from and after that day, the second part of this Act shall become and be in force and take effect in such county or city accordingly."

Provision is then made that such Order in Council shall not be revoked for three years, and then only on similar petition, notice, and similar proceedings.

It is contended, that assuming the Parliament of Canada has the power to pass an Act for the prohibition of traffic in intoxicating liquors provided for by the second part of the Act, that the first part of the Act is a delegation of legislative powers to a portion of the people; that the Dominion Parliament has no right to delegate such powers, or to make its regulation subject to, or conditional on, its acts being adopted by any other body.

It cannot be doubted, and indeed it was admitted by Mr. *Kaye* in his very able argument on behalf of the respondent, that the Parliament of Great Britain has the general power of making such regulations and conditions as it deems expedient with regard to the taking effect or operation of laws, either absolute, or conditional and contingent; and in his factum he says:—"It may also be conceded that a body like that of the Provincial Parliament before Confederation could and did pass acts of a like kind, which it was not competent to a judicial tribunal to question."

Although the Dominion Parliament does derive its powers from the B. N. A. Act, it cannot, I think, be successfully disputed that with respect to those matters over which legislative authority is conferred, plenary powers of legislation are given "as large and of the same nature as those of the Imperial Parliament itself," and therefore they may be exercised either absolutely or conditionally, and, as was established by the Privy Council in the case of *The Queen* v. *Burah* (1), cited in *Valin* v. *Langlois* (2), leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to

(1) 3 App. Cas. 889. (2) 3 Can. S. C. R. 17; *ante*, vol. 1, p. 158.

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extend. The Parliament of Great Britain having, as I think, conferred on the Dominion Parliament this general, absolute, uncontrolled authority to legislate, in their discretion, on all matters over which they have power to deal, subject only to such restrictions, if any, as are contained in the B. N. A. Act, and subject, of course, to the sovereign authority of the British Parliament itself, with reference to the question under consideration, I can find in the B. N. A. Act no limitation, either in terms or by necessary implication, o the general power so conferred, and without which the legislative power should not, in my opinion, be limited by judicial interpretation. In the United States, where frequent discussions have arisen under the written constitutions, Federal and State, by which the legislative powers are limited and restricted, Mr. Cooley, in his work on Statutory Limitations, thus states the doctrine as there understood (1): "But it is not always essential that a legislative act should be a completed statute, which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event."

It has likewise been urged that this Act affects only particular districts—that it is not general legislation, and therefore is *ultra vires*. I am entirely unable to appreciate this objection. If the subject-matter dealt with comes within the classes of subject assigned to the Parliament of Canada, I can find in the Act no restriction which prevents the Dominion Parliament from passing a law affecting one part of the Dominion and not another, if Parliament, in its wisdom, thinks the legislation applicable to and desirable in one part and not in the other. But this is a general law applicable to the whole Dominion, though it may not be brought into active operation throughout the whole Dominion.

This brings us to the consideration of the really substantial question in this case, which arises under the second part of the Act, viz: Has the Dominion Parliament the power of prohibiting the traffic in intoxicating liquors in the Dominion, or in any part of it?

Sec. 99 enacts that—"From the day on which this part of this Act comes into force and takes effect in any county or city, and for so long thereafter as the same continues in force therein, no person, unless it be for exclusively sacramental or medicinal purposes, or for *bona fide* use in some art, trade or manufacture,

(1) Ed. 4, p. 142.

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under the regulation contained in the fourth sub-section of this section, or as hereinafter authorized by one of the four next sub-sections of this section *shall, within such county or city, by himself, his clerk, servant or agent, expose or keep for sale, or directly or indirectly, on any pretence or upon any device, sell or barter, or in consideration of the purchase of any other property give*, to any other person, any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating."

The second sub-section provides that—"Neither licenses to distillers or brewers, nor for retailing on board any steamboat or vessel, nor yet any other description of license whatever, shall in anywise avail to render legal any act done in violation of this section."

Sub-section 3 provides for the sale of wine for exclusively sacramental purposes, and sub-section 4 for the sale of intoxicating liquor for exclusively medicinal, or for *bona fide* use in some trade or manufacture.

Sub-section 5 contains a proviso—"That any producer of cider in the county, or any licensed distiller or brewer, having his distillery or brewery within such county or city, may thereat expose and keep for sale such liquor as he shall have manufactured thereat, and no other; and may sell the same thereat, but only in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at any one time, and only to druggists and others licensed as aforesaid (that is, to sell for sacramental, medicinal and trade purposes), or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the county or city, and of any adjoining county or city in which the second part of this Act is then in force, and to be wholly removed and taken away in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at a time."

Sub-section 6 contains a proviso of a similar character in favour of—"Any incorporated company authorized by law to carry on the business of cultivating and growing vines and of making and selling wine and other liquors produced from grapes, having their manufactory within such county or city."

With a further proviso by sub-section 7—"That manufacturers of pure native wines made from grapes grown and produced by them in the Dominion of Canada, may when authorized to do so by license from the Municipal Council or other authority

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having jurisdiction where such manufacture is carried on, sell such wines at the place of manufacture in quantities of not less than ten gallons at one time, except when sold for sacramental or medicinal purposes, when any number of gallons from one to ten may be sold."

And by sub-section 8 it is provided also—"That any merchant or trader exclusively in wholesale trade, and duly licensed to sell liquor by wholesale, having his store or place for sale of goods within such county or city, may thereat keep for sale and sell intoxicating liquor, but only in quantities not less than ten gallons at any one time, and only to druggists and others licensed as aforesaid, or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the county or city, and of any adjoining county or city in which the second part of this Act is then in force, to be wholly removed and taken away in quantities of not less than ten gallons at a time."

It is contended that this is strictly a temperance Act, passed solely for the promotion of temperance, and not an Act dealing with any of the matters within the power of the Dominion Parliament—that the power to deal with the sale of spirituous liquors, and the granting of licenses therefor, and laws for the prevention of drunkenness, and of the like character of preventive means, are within the exclusive power of the Local Legislatures, and the recital of the Act is relied on as indicating conclusively its character.

If the Dominion Parliament legislates strictly within the powers conferred in relation to matters over which the B. N. A. Act gives it exclusive legislative control, we have no right to enquire what motive induced Parliament to exercise its powers. The statute declares "it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects enumerated, of which the regulation of trade and commerce is one; and any matter coming within any of the classes of subjects enumerated shall not be deemed to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces. If, then, Parliament in its

wisdom, deems it expedient for the peace, order and good government of Canada, so to regulate trade and commerce as to restrict or prohibit the importation into, or exportation out of, the Dominion, or the trade or traffic in, or dealing with, any articles in respect to which external or internal trade or commerce is carried on, it matters not, so far as we are judicially concerned; nor had we, in my opinion, the right to enquire whether such legislation is prompted by a desire to establish uniformity of legislation with respect to the traffic dealt with, or whether it be to increase or diminish the volume of such traffic, or to encourage native industry, or local manufactures, or with a view to the diminution of crime or the promotion of temperance, or any other object which may, by regulating trade and commerce, or by any other enactments within the scope of the legislative powers confided to Parliament, tend to the peace, order, and good government of Canada. The effect of a regulation of trade may be to aid the temperance cause, or it may tend to the prevention of crime, but surely this cannot make the legislation *ultra vires*, if the enactment is, in truth and fact, a regulation of trade and commerce, foreign or domestic.

The power to make the law is all we can judge of; and the recital in the Act so much relied on ought not, in my opinion, to affect in any way the enacting clauses of the Act, which are in themselves abundantly plain and explicit, requiring no elucidation from and admitting of no control by the recital, which can only be invoked in explanation of the enacting clauses if they be doubtful. Why it was deemed necessary to insert the self-evident abstract proposition that "it is very desirable to promote temperance in the Dominion," and to enact that this Act may be cited as "The Canada Temperance Act, 1878," does not seem very apparent, when the title of the Act itself was "An Act respecting the Traffic in Intoxicating Liquors," and it contained a recital, that it was desirable there should be uniform legislation in all the Provinces respecting such traffic, which shews the legislation on its face immediately within the power of Parliament. It may be that all who voted for this Act may have thought it would promote temperance, and were influenced in their vote by that consideration alone, and desired that idea should prominently appear. Still, if the enacting clauses of the Act itself deal with the traffic in such a manner as to bring the legislation within the powers of the Dominion Porliament, no such declaration in the preamble or permissive title can so control the enacting clauses as to make the Act *ultra vires;* though it can-

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not be doubted that the introduction of this temperance element on the face of the Act may have very much stimulated the idea, which has been so much relied on, that the legislation was not a regulation of trade and commerce, but was for the suppression of intemperance—a matter assumed to be within the exclusive power of the Local Legislatures, and so beyond the powers of the Dominion Parliament. If we eliminate from the recital in the Act the abstract proposition and the permissive clause to cite the Act as "The Canada Temperance Act, 1878," there does not appear to be a word in the title, preamble or enacting clauses, from which the slightest inference could be drawn that Parliament was dealing with a subject matter other than simply as a regulation of trade and commerce in respect to the traffic in those particular articles of intoxicating liquors.

It has also been contended that no legislative powers to prohibit exist in the Dominion. I must respectfully, but most emphatically, dissent from this proposition. I cannot for one moment doubt, that by the B. N. A. Act plenary power of legislation was vested in the Dominion Parliament and Local Legislatures respectively to deal with all matters relating to the purely internal affairs of the Dominion, unless, indeed, anything could be found in the Act in express terms limiting such power, each, of course, acting within the scope of their respective powers; and, therefore, where one has not the power so to legislate, it necessarily belongs to the other. If this be so, then the question is: is this legislation within the powers conferred on the Dominion Parliament, or does it encroach on the powers exclusively confided to the Local Legislature? For, with its expediency, its justice or injustice, its policy or impolicy, we have nothing whatever to do.

Much has been said as to the analogy of the Dominion Parliament and Local Legislatures with the Congress of the Federal Government and the State Legislatures of the United States. But the constitution of the United States and the constitution of the States, as regards the powers which each may exercise, are so different from the relative powers of the Dominion Parliament and Provincial Legislatures, that the cases to be found in the American books, with regard to the powers of the State Legislatures in prohibiting the sale of intoxicating liquors, afford no guide whatever in the determination of the powers of the Local Legislatures and the Dominion of Canada. The Government of the United States is one of enumerated powers, and the Governments of the States possess all the

general powers of legislation Here we have the exact opposite. The powers of the Provincial Governments are enumerated, and the Dominion Government possesses the general powers of legislation. Therefore we are told by Mr. Cooley that—"When a law of Congress is assailed as void, we look in the National Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States, or of the State, we are able to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the Constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes, either expressly or by clear implication, while the State Legislature has jurisdiction of all subjects on which its legislation is not prohibited (1)."

With us the Government of the Provinces is one of enumerated powers, which are specified in the B. N. A. Act, and in this respect differs from the Constitution of the Dominion Parliament, which, as has been stated, is authorized "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Therefore "the regulation of trade and commerce," being one of the classes of subjects enumerated in section 91, is not to be deemed to come within any of the classes of a local or private nature assigned to the Legislatures of the Provinces.

To my mind it seems very clear that the general jurisdiction or sovereignty which is thus conferred emphatically negatives the idea that there is not within the Dominion legislative power or authority to deal with the question of prohibition in respect to the sale or traffic in intoxicating liquors, or any other article of trade or commerce.

(1) Cooley, Cons. Lim., 4th ed., p. 210.

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It is said that a power to regulate does not include a power to prohibit. Apart from the general legislative power which, I think, belongs to the Dominion Parliament, I do not entertain the slightest doubt that the power to prohibit is within the power to regulate. It would be strange, indeed, that, having the sole legislative power over trade and commerce, the Dominion Parliament could not prohibit the importation or exportation of any article of trade or commerce; or, having that power, could not prohibit the sale and traffic, if they deemed such prohibition conducive to the peace, order, and good government of Canada.

There seems to be no doubt on this point in the United States. Mr. Story on the Constitution of the United States, with reference to the regulation of foreign commerce, which belongs to the National Government (as the regulation of foreign and internal trade and commerce does to the Dominion Government) says:— "The commercial system of the United States has also been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation, and the shipping and mercantile interest, by bounties, by discriminating duties, and by special preferences and privileges; and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty" (1).

So in the case of *The United States* v. *Holliday* (2), in reference to the rights of Congress under its power to regulate commerce with the Indian tribes, the Supreme Court of the United States held that that power extended to the regulation of commerce with the Indian tribes and with the individual members of such tribes, though the traffic and the Indian with whom it was carried on were wholly within the territorial limit of the State. The Act made it penal to sell spirituous liquors to an Indian under charge of an Indian agent, although it was sold outside of an Indian reserve and within the limits of a State. The Court held the Act constitutional, and based upon the power of Congress to regulate commerce with the Indians.

The contention in this case, as put by the learned judge who delivered the judgment of the Court, was, "that so far as the Act

(1) Story, Con, U. S., s. 1076. (2) 3 Wallace, 407, 416.

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was intended to operate as a police regulation to enforce good morals within the limits of a state of the Union, that belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State—among its own inhabitants or citizens, and not within the powers conferred on Congress by the commercial clause." But the Court thus deals with this contention. Mr. Justice Miller says:—"The Act in question, although it may partake of some of the qualities of those Acts passed by State Legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be called a regulation of commerce. 'Commerce,' says Chief Justice Marshall, in the opinion in *Gibbons* v. *Ogden*, to which we so often turn with profit when this clause of the Constitution is under consideration, 'Commerce undoubtedly is traffic, but it is something more—it is intercourse.' The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

"If the Act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' Commerce with foreign nations, without doubt, means commerce between the citizens of the United States and citizens or subjects of foreign Governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The Act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provision.

"Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the Act regulating it unconstitutional?

"In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign States, says: 'The power does not stop at the jurisdictional limits

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of the several States. It would be a very useless power if it could not pass those lines. If Congress has power to regulate it, that power must be exercised wherever the subject exists.' It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes."

It has been likewise very strongly urged that the Dominion Parliament cannot have the right to prohibit the sale of intoxicating liquors as a beverage, because to do so would interfere with the right of the Local Legislatures to grant licenses and to deal with property and civil rights and matters of a purely local character, and so with the right of the Local Legislature to raise a revenue by means of shop and tavern licenses. I fail to appreciate the force of this objection. If substantial, it would prohibit to a great extent the Dominion Parliament from legislating in respect to that large branch of trade and commerce carried on in intoxicating beverages, and so take away the full right to regulate alike foreign and internal commerce. If they cannot prohibit the internal traffic because it prevents the Local Legislatures from raising a revenue by licensing shops and taverns, the same result would be produced if the Dominion Parliament prohibited its importation or manufacture. For by the same process of reason it must follow that they could not prohibit its importation or manufacture, or in any way regulate the traffic, whereby the sale or traffic should be injuriously affected, and so the value of licenses be depreciated or destroyed. In my opinion, if the Dominion Parliament, in the exercise of and within its legitimate and undoubted right to regulate trade and commerce adopt such regulations as in their practical operation conflict or interfere with the beneficial operation of local legislation, then the law of the Local Legislature must yield to the Dominion law, because matters coming within the subjects enumerated as confided to Parliament are not to be deemed to come within the mat-

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ters of a local nature comprised in the enumeration of subjects assigned to the Local Legislatures; in other words, the right to regulate trade and commerce is not to be overridden by any local legislation in reference to any subject over which power is given to the Local Legislature.

A case precisely analogous in principle to this is to be found in the Reports of the United States Supreme Court (1), where the State Legislature had the control of the internal commerce, and the Federal Government the right to raise a revenue by licenses, while here the Dominion Government have the control of the internal trade and commerce, and the Local Legislatures the right of raising a revenue by granting licenses. It was not doubted that where Congress possessed constitutional power to regulate trade and commerce, it might regulate it by means of licenses, and in case of such a regulation a license would give authority to the licensee to do whatever its terms authorized, but that very different considerations applied to the internal commerce or domestic trade of the States, over which Congress had no power to regulate, nor any direct control, but the power belonged exclusively to the States. There the power to authorize a business within the State was held plainly repugnant to the exclusive power of the State over the same subject. So here, over trade and commerce the Local Legislature have no power of regulation nor any direct control, and therefore the power of the Local Legislature to authorize a business is equally repugnant to the power of the Dominion Parliament over the same subject; and therefore, while Congress had the power to tax, it was held to reach only existing subjects, and could not authorize a trade or business within a State, in order to tax it; that if the licenses were to be regarded as giving authority to carry on the branches of the business which they license, it would be difficult, if not impossible, to reconcile the granting of them with the Constitution. But it was held that it was not necessary to regard the laws as giving such authority—that, so far as they related to trade within State limits, they gave none and could give none.

If this same principle is applied here, the right of the Local Legislatures to tax by means of licenses gave the licensees no authority to exercise trade or carry on business prohibited by the Dominion Parliament having this control of trade and commerce. I think it equally clear that the Local Legislatures have not the

(1) License Tax Cases, 5 Wallace, 462.

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power to prohibit, the Dominion Parliament having not only the general powers of legislation, but also the sole power of regulating as well internal as external trade and commerce, and of imposing duties of customs and excise; and having by law authorized the importation and manufacture of alcoholic liquors, and exacted such duties thereon, and so far legalized the trade and traffic therein, to allow the Local Legislatures, under pretence of police regulation, on general grounds of public policy and utility, by prohibitory laws, to annihilate such trade and traffic, and practically deprive the Dominion Parliament of a branch of trade and commerce from which so large a part of the public revenue was at the time of Confederation raised in all the Provinces, and has since been in the Dominion, never could have been contemplated by the framers of the B. N. A. Act, but is, in my opinion, in direct conflict with the powers of Parliament, as well over trade and commerce as with their right to raise a revenue by duties of import and excise.

When I had the honor to be Chief Justice of New Brunswick, the question of the right of the Local Legislatures to pass laws prohibiting the sale or traffic in intoxicating liquors came squarely before the Supreme Court of that Province, and that Court, in the case of *Regina* v. *The Justices of King's County* (1), unanimously held that under the B. N. A. Act the Local Legislature had no power or authority to prohibit the sale of intoxicating liquors, and declared the Act with that intent *ultra vires*, and therefore unconstitutional. I have carefully reconsidered the judgment then pronounced, and I have not had the least doubt raised in my mind as to the soundness of the conclusion at which the Court arrived on that occasion. I then thought the Local Legislature had not the power to prohibit; I think the same now. I then thought the power belonged to the Dominion Parliament; I think so still, and therefore am constrained to allow this appeal.

FOURNIER, J. :—

After having carefully considered the important questions which arise on this appeal, and having had the opportunity of taking communication of the able and elaborate judgment of the Chief Justice, I need only say that I entirely concur in the view taken by him as to the constitutionality of the Canada Temperance Act, 1878, and that the appeal should be allowed.

(1) 2 Pugsley, 535.

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HENRY J. :—

This case—argued before us a few weeks ago—being, in my judgment, one of the most important that has arisen, or is likely to arise and be presented for our decision, called for the most serious and deliberate consideration.

The issue raised is as to the constitutionality of an Act passed by the Parliament of Canada, in 1878, entitled "An Act respecting the Traffic in Intoxicating Liquors," and which provides that it may be cited as "The Canada Temperance Act, 1878." Prefixed to the Act is a preamble as follows: "Whereas it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors."

The second section provides for the repeal of several sections of the Act of Canada known as "The Temperance Act, 1864." The Act also indirectly repeals all the Acts in force, in all the Provinces, for the issue of licenses for the sale of intoxicating liquors, and thereby necessarily affects and controls the Provincial legislative functions provided for by sub-section 9 of section 92 of the B. N. A. Act, 1867.

It provides, that on a petition of one-fourth of the electors of any county or city, to the Governor-General in Council, a poll shall be taken; and a majority of the electors are authorized to decide whether or not the Act shall go into operation within the county or city, as the case might be. If the answer should be in the affirmative, the prohibition contained in section 99 and the following sections, called the "Second Part" of the Act, becomes operative.

It has, I think, been legitimately contended, that in reference to all but one or two subjects, not in any way connected with the matter under consideration, the legislative powers of the Parliament of Canada and Local Legislatures are not concurrent, but fully distributed, and in part enumerated.

It is contended that Parliament had the necessary power to pass the Act—1st, under the general provision of section 91; 2nd, under the second sub-section, "The Regulation of Trade and Commerce;" and 3rd, under sub-section 27, "The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters," and in connection with, and supplementing them, the concluding clause of section 91, which provides that: "Any matter coming within any of the

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classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

That position is contested on the other side.

The right to provide for the issuing of licenses for the sale of spirituous liquors is claimed for the Local Legislatures.

The leading clause of section 92 is as follows: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say," etc.

Sub-section 9: "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes."

Sub-section 13: "Property and civil rights in the Province."

Sub-section 15: "The imposition of punishment, by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

And 16: "Generally all matters of a merely local or private nature in the Province."

It has been properly said, that it is a serious matter to consider and decide that an Act of a Legislature is *ultra vires*; but it is much more serious and unfortunate, by any judicial decision, to destroy the Constitution of a country. The importance of our decision arises, not nearly so much from any effect it may have on the Act in question, which, in itself, claims from us the most patient and deliberate consideration, but from the general result in view of the constitutional relations established by the Imperial Act in question, as provided in the sections referred to in regard to other subjects.

A few days ago, I ascertained that my learned brethren were disposed to arrive at conclusions different from those which I considered the correct ones; and I have endeavoured, as far as other judicial duties permitted, to formulate the views I entertain, so as, at as early a moment as possible, to be able with my colleagues to give the result of our deliberations. Knowing the great interest taken in the subject, and it being desirable that Parliament—now sitting—should be informed of the result, I have felt bound to hasten the preparation of my judgment, but, in doing so, am obliged rather to give the conclusions at which I have arrived, than

the argument at length in favour of them, or in detail the reasons by which I have been actuated.

It is contended that, inasmuch as the Local Legislatures could not provide as is done by this Act, Parliament necessarily must have the power it exercised. The proposition, as a general one, may be admitted; but there may be, and, I think there are, exceptions, and that this may fairly be considered one of them. The position was assumed at the argument by the Counsel of the appellant, but not debated.

It was decided by the Court of New Brunswick, that municipal authorities under the Local Legislature had not the right to refuse to grant licenses, because it was an interference with trade and commerce; but the Court in Nova Scotia decided to the contrary. It has, therefore, not had that judicial sanction either way that would call upon us, without full independent consideration and inquiry, to adopt either view. I think that in this case we are to be guided by other considerations. If the Local Legislatures have not the power to refuse licenses, or to authorize municipal bodies to do so, because interfering with the prerogative of Parliament as to trade or commerce, it does not necessarily follow that Parliament can do so. If by the Imperial Act the Local Legislatures have the prerogative of dealing with the subject of shop and tavern licenses, that prerogative is just as full and complete as that of Parliament in the other case, and as much entitled to be maintained independent of the consideration of the other proposition. We must decide upon the relative functions and prerogatives by the several specific and general provisions of the Imperial Act, and our ascription of powers to either must be in accordance with, and can go no further than, the Act prescribes.

If there be not concurrent legislative powers, and the Act is *intra vires*, then the necessary conclusion is, that all the local legislation on the subject of shop, saloon, tavern, and auctioneers' licenses since the 1st of July, 1867, has been *ultra vires*. Under such circumstances, it would be interesting to inquire where there is any law in force restraining the sale of spirituous liquors in counties or cities who have not adopted the Canada Temperance Act, 1878.

By the construction put by the Supreme Court of the United States upon its Constitution, concurrent jurisdiction has been found to exist in relation to several subjects; and legislation, by the States, has been decreed to be *intra vires* in many cases, until

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Congress legislated on the same subject. The Imperial Act, however, provides against such intermediate legislation, and gives to Parliament and the Local Legislatures exclusive jurisdiction, and contingent upon previous legislation by either. If this Act is sustained as *intra vires*, the result is to leave the sale of spirituous liquors contingent upon the vote of each county or city. One county or city where the Act is applied will have the prohibition, and the county or city which has not, or does not adopt it, will have no legislative restriction upon the sale. A decision of this case contrary to my views must produce that result. It is therefore most important, in the best interests of the country, that the correct solution should be reached.

In order properly to construe the Imperial Act, it is necessary and proper to consider the position of the United Provinces before the Union. Each had what may properly be called plenary powers of legislation in respect of Provincial subjects. In the agreement for the Union, provision was made for the general powers of Parliament and the Local Legislatures, as well as for the "ways and means" by which each was to be sustained. It was by a surrender of the local legislative power, to the extent agreed upon, that the powers of the Parliament were agreed to be given. It was in the nature of a solemn compact, to be inviolably kept, that the rights and prerogatives of both were adopted, and the agreements entered into were intended to be carried out by the Act mentioned. That that compact cannot be changed by one, any more than another of the contracting parties, is a proposition embodied in despatches from the Imperial Government, and one which, I think, cannot be gainsaid. It is, therefore, only permissible to construe the Act in conformity with that of consideration.

The first, and, as I think, the only important consideration, is the extent to which effect should be given to the provision "The Regulation of Trade and Commerce;" and admitting, for the moment, the power of Parliament to pass the Act in reference to that subject, has it properly dealt with it? In deciding upon this question, our first inquiry is, whether Parliament intended the Act as a regulation of trade or commerce? It does not necessarily follow, that if one in the pursuit of one purpose or object does an unjustifiable act, he can take shelter under a right he did not intend to assert or act on. There are circumstances in which, in such a case, the party would not be held justified.

The preamble of an Act will not, of course, by itself, give or take

away jurisdiction to legislate. If, however, the Legislature plainly shows by the preamble and provisions of the Act that the legislation was directed, not in the pursuance of legitimate power, but in reference to a subject over which it had no jurisdiction, I am far from thinking it would be legitimate. We cannot assume any Legislature would so act.

The preamble informs us that it was "*very desirable to promote temperance*," and the Act is provided to be cited as "The Canada Temperance, Act, 1878." The object is therefore patent, but it is contended that the subsequent words in the preamble: "And that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors"—makes a direct reference to *trade and commerce*. If the words last quoted stood alone, they would, to the extent they go, support the contention; but following the previous expression of the desire to *promote temperance*, we should construe them as only the expression of the idea, that to *promote temperance* uniform legislation respecting the traffic in spirituous liquors was deemed necessary as a means to the end, and not as at all intended as a regulation of trade and commerce.

By the 3rd section, certain sections of the Temperance Act of 1864 were repealed, but nothing is contained in the Act at all referring to *trade or commerce*. It is, therefore, plain and palpable, that the subject of trade or commerce was not at all present in the Parliamentary mind. The Act, taken altogether, shews it was not passed by Parliament as a regulation of trade or commerce. I have serious doubts, whether in such a case we would not be wrong in concluding that Parliament ever intended it as such, or that we should, in view of any power it had over the subjects of trade or commerce which it clearly did not intentionally exercise, give effect to the Act passed avowedly for a totally different purpose.

It is not, however, necessary for me to rest my decision wholly on that point, as there are others more serious and important. The great and important question arises as to the effect to be given to the term "The Regulation of Trade and Commerce," taken, as we are bound to take it, in connection with the provision for licensing shops, saloons, taverns, etc. We are to consider the matter of the regulation of trade and commerce, not only as to the scope and meaning of the term in its full force, but in relation to the licensing power expressly given to the Local Legislatures.

Mr. Story, in his work of high authority on the Constitution of

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the United States (1), quotes approvingly from a judgment of the Supreme Court principles of construction applicable to this case: "The Government, then, of the United States can claim no powers which are not granted to it by the Constit tion; and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms. And where a power is expressly given in general terms, it is not to be restrained to particular cases, *unless that construction grow out of the context expressly, or by necessary implication.* The words are to be taken in their natural and ordinary sense, and not in a sense unreasonably restricted or enlarged."

He says (2): "On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. . . . Nor should it ever be lost sight of, that the Government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, *pro tanto*, the establishment of a new Constitution."

Vattel, in his second book, chap. 17, sections 285, 286, says: "But the most important rule in cases of this nature, is, that a Constitution of Government does not, and cannot, from its nature, depend in any great degree upon verbal criticism or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stand well with the context and subject-matter, it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe; and, as has already been stated, that must be the truest exposition which best harmonizes with its design, its objects and its general structure."

Taking, then, the provisions in regard to trade and commerce, according to the reliable authority I have first quoted, and all governing ones, in their natural and obvious sense in the relation in which they are placed, "and not in a sense unreasonably enlarged," how should we construe them?

The right to legislate in regard to the licenses in question is clearly

(1) Section 417.

(2) Section 426.

with the Local Legislatures, if not controlled by the provision for the regulation of trade and commerce alone, or through the operation of the concluding clause of section 91. If the two sub-sections stood alone. I should have little difficulty in concluding that sub-section 9 of 92 was intended to and does control sub-section 2 of 91; for, I think, we would be bound to conclude that, by the express and specific terms of sub-section 9 of 92, the subject-matter was intended to be free from the operation of the general provision in regard to trade and commerce. We are not to decide upon the comprehensiveness of the latter provision as if standing alone, but to ascertain if, in the employment of the general term, and the giving of power to another body to deal specifically with a subject that might be otherwise considered to be embraced by the general term, it was not intended that the specific power should not be considered as excepted from the general provision. We are bound, I think, to conclude that in using the general term it was not intended to reach the subject specifically provided for in sub-section 9 of 92. It was clearly intended to give the licensing power to the Local Legislature, because the section so plainly and unequivocally so provides; but then it is contended the concluding clause of 91 overrules the specific provision in sub-section 9 of 92, and virtually ignores it, if the general term as employed in regard to trade and commerce includes the subject-matter. That, however, drives us back to the original proposition, and makes the contention no better; so that if the regulation of trade and commerce, as provided for in the general terms used, was not intended to embrace the subject so far as to nullify the specific provision for shop and other licenses, and therefore not to that extent included in the general provision for trade and commerce, the concluding clause would be inapplicable to it. There are, however, other important considerations not to be lost sight of.

When the union was negotiated and the Imperial Act passed, the leading idea was that in the large and extensive subjects affecting all the Provinces the general Parliament should legislate and the smaller and less important subjects should be left to the Local Legislatures; and from the whole object of the union, and the Act by which it was formed, we may gather that the same principle would be properly applicable to the matter of trade and commerce.

We may therefore, I think, reasonably conclude that the regulation of trade and commerce referred to was, when taken in connection with the whole scope and object of the Act, intended to apply

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to the general features, and not to the minute and trifling subjects, which might otherwise be considered as included. There are numberless subjects, more or less connected with trade and commerce, and which would be properly classed as coming within the classes of subjects given expressly to the Local Legislatures, but which are of so unimportant a character, as affecting the general trade and commerce of the Dominion, that the Union Act may be fairly construed as not intended to give to the general Parliament the power to regulate them; but if everything connected with trade or commerce, however remotely, is decided to be exclusively with the general Parliament, all the local Acts in reference to such matters would be, *ab initio*, void. The general Parliament legitimately provides for manufactures and for the importation of goods. It provides rules to govern parties importing such goods. Free interchange of all articles was provided for between the United Provinces, and when spirituous or other articles are imported, and the duties paid, they pass free from one Province to another. They are then clear of any claim over them of the general Parliament or Government, and under the terms "property and civil rights" become amenable to local legislation. Taking, then, the provision for the legislation as to licenses for the sale of spirituous liquors in shops, etc., and the whole Act, and its objects, can it be reasonably claimed that that provision was not intended to leave the subject-matter clear of the operation of the general provision in regard to trade and commerce?

A question has been raised, whether the general Parliament could not wholly prohibit the manufacture or importation of spirituous liquors. That question, however, is not involved in the issue before us. It is time enough to debate it when a necessity arises to do so. The one we have to consider is that Parliament, having authorized the importation and manufacture of spirituous liquors, and having received the revenue therefrom, can it, by assuming the right to legislate for the promotion of temperance, although to some extent affecting trade and commerce, deprive the Local Legislatures, and the people of the several Provinces, of the right to raise the revenue from it specifically provided by sub-section 9?

As I before stated, the Imperial Act was founded on a compact for the federative union of the several Provinces; and from the explicit and unequivocal terms of section 9, we must conclude that the revenues to be derived from the issue of the licenses mentioned was intended to be permanently secured to the local authorities.

Previously to the union, the revenues derived from licenses for the retail of spiritous liquors, I have reason to believe, in all the Provinces were given to and appropriated by municipal bodies, for municipal purposes, and I must conclude that they were intended to continue so, or, at all events, to leave it to the Local Legislatures to decide whether they should so remain, or be appropriated for other local or Provincial purposes. Whether such revenues were great or insignificant, the principle applicable must be the same. If they amounted to several thousands of dollars, as I presume they did in some of the Provinces, it must be concluded that their retention by the local authorities was considered of importance, and accordingly was a part of the compact. The protection of the right to those revenues is a matter relatively of as much importance to the several Provinces as the protection of the right of the Dominion to the millions of dollars which the Act enabled its Government and Parliament to collect from the whole body of the people for Dominion purposes. I am free to admit the full scope and meaning of the grant of the power to regulate trade and commerce, and that but for the specific grant of the power to the Local Legislature by section 9 the ground might be covered, but, in the language and doctrine of Vattel: "While we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of Government we are to construe, and . . . that must be the truest exposition which best harmonizes with its design its objects and its general structure."

I am of the opinion that is the way we should construe the Act of Union, and, if we do, we can have but little difficulty in reaching the conclusion that the Act in question is an usurpation of power, and an inroad upon the Constitution and prerogatives of the Local Legislatures, and results in depriving them of one of the reservations for local objects intended and provided for by the compact and Act of Union.

If the general Parliament had the power to legislate as the Act provides, it is only under the provisions I have referred to, and, that power once admitted, what is there to restrain its further legislation—what is there to prevent it from changing and altering the whole principle and framework of the Act, so as, by "the regulation of trade and commerce," to provide for licenses for the sale of spirituous liquors for any purpose. and to collect a revenue therefrom? The present Act if *intra vires*, virtually repeals all local

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Acts on the subject of licenses. It prohibits, if the majority in a county or city so wills, the sale of spirituous liquors except for certain purposes mentioned; but, if it has full and complete power over the subject-matter, it may remove at any time the prohibitions, and provide for licenses for the sale for other purposes, prescribe duties to be paid for them, and take the revenues that were clearly, to my mind, intended for Provincial, local or municipal purposes. This may be called an extreme proposition, on the ground that Parliament would be restrained by motives of expediency; but, in the first place, the working out of the local Constitution should not depend upon Parliament, and, in the next, if the Local Legislatures have no power over the subject-matter, Parliament must take cognizance of it, or the sale will be wholly unrestricted.

These considerations are of importance to exhibit the difficulties and wrongs involved in the validation of the Act; but they are insignificant compared with the consequences which, in my opinion, must necessarily result in regard to other subjects, and in other respects. If it be finally decided that the provision for "the regulation of trade and commerce" overrides the power of the Local Legislatures in the matter of licenses, I see no impediment, in the way of legislation, in regard to matters affecting in the remotest way trade and commerce, that would not merely restrain and control, but completely nullify, the local legislative power in respect of "property and civil rights" and other important interests. It may be said, there is no danger to be apprehended in this respect, and that Parliament could not be expected to legislate with such a result; but my answer is, that we cannot allow any such considerations to affect our judgment. We are required to estimate the powers given severally to Parliament and the Local Legislatures, and it is our duty so to define them that neither will have to depend on the forbearance of the other.

I am fully sensible of the difficulty of laying down any general rule of construction applicable to all cases, or of drawing any line. Each case must largely depend upon its own merits as it arises, and when principles are applied to one case all similar ones will be determined by them. I consider the subject of licenses for the retail of spirituous liquors in shops, saloons and taverns is wholly one of the nature of a police regulation, and that it was not intended, either by the compact for union, or the Act passed therefor, that the local power should be affected, restrained, or controlled by any Dominion legislation.

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There were other objections to the Act, raised by counsel, to which I have not thought it necessary to refer, as I think those I have given sufficient.

I have, however, considered the ground taken on the other side, that Parliament had the right to pass the Act under the provision of sub-section 27 of section 91, "The Criminal Law," but have been unable to accede to the proposition. I cannot think it was the intention, under that general term, to give to Parliament power to the extent contended for, and I cannot find by the Act itself anything that would bring the subject within the category of criminal jurisprudence.

For the reasons I have rather hastily (when the importance of the issue is considered) put together, and so imperfectly but I trust intelligibly expressed, I think the appeal should be dismissed, and the judgment below affirmed with costs.

TASCHEREAU, J.:—

I am of opinion to allow this appeal. It is clear that the Canada Temperance Act, 1878, could not be enacted by the Provincial Legislatures, for the simple reason that they have only the powers that are expressly given to them by the B. N. A. Act, and that the said B. N. A. Act does not give them the power to effect such legislation. This has been held in *Reg.* v. *The Justices of King's* (1); in *Hart* v. *Corporation of Mississquoi* (2); in *Coocy* v. *The Municipality of Brome* (3)—reversed in Queen's Bench, Montreal, but judgment of Queen's Bench reversed in Supreme Court, by consent—and in *Poitras* v. *The Corporation of Quebec* (4); and, in fact, seems to be admitted by all the learned judges of the Court below, who have held this Act to be *ultra vires* of the Dominion Parliament. Well, it seems to me, the admission that the Local Legislatures could not pass such an Act implies an admission that the Dominion Parliament can do so. Once the power of legislation over a certain matter is found not to vest in the Provincial Legislatures the question is solved, and that power necessarily falls under the control of the Dominion Parliament, subject, of course to the exigencies of our Colonial status.

Section 91 of the Imperial Act is clear on this. It expressly authorizes the Federal Parliament to make laws in relation to *all*

(1) 2 Pugsley, 535.
(2) 3 Q. L. R. 170.
(3) 21 L. C. Jur. 182.
(4) 9 Rev. Leg. 531.

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matters *not* exclusively assigned to the Provincial Legislatures, and enacts, in express terms, that the enumeration given of the classes of subjects falling under the control of the Federal Parliament is given for greater certainty, but not so as to restrict the rights of the Federal Parliament generally over *all* matters *not* expressly delegated to the Provincial Legislatures.

If this Temperance Act would be *ultra vires* of the Provincial Legislatures, because the B. N. A. Act does not give them the power to enact it, I fail to see why it is not *intra vires* of the Dominion Parliament. Then, it seems to me, that under the words "regulation of trade and commerce" the B. N. A. Act expressly gives the Dominion Parliament the right to this legislation. It may, it is true, interfere with some of the powers of Provincial Legislatures, but section 91 of the Imperial Act clearly enacts that, *notwithstanding anything* in this Act, *notwithstanding* that the control over local matters, over property and civil rights, over tavern licenses for the purpose of raising a revenue, is given to the Provincial Legislatures, the *exclusive* legislative authority of the Dominion extends to the regulation of trade and commerce; and this Court has repeatedly held, that the Dominion Parliament has the right to legislate on all the matters left under its control by the Constitution, though, in doing so, it may interfere with some of the powers left to the Local Legislatures. That the Act in question is a regulation of the *trade and commerce* in spirituous liquor, seems to me very clear. It enacts when, where, to whom, by whom, under what conditions, this traffic and commerce will be allowed and carried on. Are these not regulations? Some of the learned judges in the Court below say that the Act is *ultra vires* because it prohibits and does not regulate, whilst another learned judge of that Court says that it is *ultra vires* because it regulates and does not prohibit. To my mind, it is a regulation, whether it is taken as prohibiting or as regulating the trade in liquors. A prohibition is a regulation.

But it has been said the Temperance Act is not an Act concerning the regulation of trade and commerce, because it is not an Act *for* the regulation of trade and commerce, but only a Temperance Act. To this I may well answer by the following words of Taney, C.J., in the License Cases (1): "When the validity of a State law, making regulations of commerce, is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon

(1) 5 Howard, 504, 583.

the motives that may be supposed to have influenced the Legislature, nor can the Court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade. . . .

"The object and motive of the State are of no importance, and cannot influence the decision. It is a question of power."

These words may well be applied here. Is the Temperance Act of 1878 a regulation of trade and commerce, or of an important branch of trade and commerce? I have already said that it seems to me plain that it is so. Then, is it the less so because it has been enacted in the view of promoting temperance, or of protecting the country against the evils of intemperance? If for this object the Parliament has thought fit to make a regulation of the trade and commerce in spirituous liquors, does it lose its character of being a regulation of this trade by reason of the motive which prompted the legislator to enact this regulation? I cannot see it.

I hold, then, that the Canada Temperance Act, 1878, is constitutional, and that this appeal should be allowed, with costs.

GWYNNE, J. :—

All the arguments upon which has been based the contention, that the Act in question, "The Canada Temperance Act, 1878," is *ultra vires* of the Dominion Parliament, are attributable wholly, as it seems to me, to a want of due appreciation of the scheme of constitutional government embodied in the B. N. A. Act, and to a misconception of the terms and provisions of that Act. Historically we know, that the terms of a feasible scheme of union of all the B. N. A. Provinces constitutes a subject which for many years engaged the attention of public men in those Provinces—that the matter became the subject of debate in the Legislatures of the several Provinces—that eventually the views of public men of all political parties were moulded into the shape of resolutions, which, having been subjected to the most careful consideration and criticism in the Provincial Legislatures, and to the consideration also of the Imperial authorities, in consultation with delegates sent for the purpose to England by the respective Provinces, were, after having been revised and amended, reduced into the form of a Bill, which the Imperial Parliament, at the special request of the Provinces, passed into an Act.

The object of this Act was, by the exercise of the sovereign

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Imperial power, called into action by the request of the then existing Provinces of Canada, Nova Scotia and New Brunswick, to revoke the Constitutions under which those Provinces then existed, and, as the preamble of the Act recites, to unite them federally into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom—to sow, in fact, the seed of the parent tree, which, growing up under the protecting shadow of the British Crown until it should attain perfect maturity, would in the progress of time become a nation, identical in its features and characteristics with that from which it had sprung, and to which, in the meantime, should be given the new name of "Dominion," significant of the design conceived, and of the anticipated fortunes of this new creation.

The Act then proceeds to shew, that the mode devised for founding this new "Dominion," and for giving to it a Constitution similar in principle to that of the United Kingdom, was to constitute it as a *quasi* Imperial sovereign power, invested with all the attributes of independence, as an appanage of the British Crown, whose executive and legislative authority should be similar to that of the United Kingdom—that is to say, as absolute, sovereign and plenary as, consistently with its being a dependency of the British Crown, it could be, in all matters whatsoever, save only in respect of matters of a purely municipal, local or private character—matters relating (to use the language of a statesman of the time) "*to the family life*" (so to speak) of certain subordinate divisions, termed Provinces, carved out of the Dominion, and to which Provinces legislative jurisdiction limited to such matters was to be given.

The inhabitants of those several Provinces, being, as such, members of this *quasi* Imperial power termed the Dominion of Canada, might in some matters have interests *qua* inhabitants of the particular Province in which they should live, distinct from, or conflicting with, the general interests which they would have as constituent members of the Dominion. In order to prevent the jarring of those distinct or conflicting interests, and to maintain the peace, order, and good government of the whole, it would be necessary, in any perfect measure, that provision should be made for such a contingency; that the subordinate should yield to the superior—the lesser to the greater; and that, in respect of any matter over which the several Provinces might be given any legislative authority concurrently with the Dominion Parliament,

the authority of the latter, when exercised, should prevail, to the exclusion, and, if need be, to the extinction of the Provincial authority.

The scheme therefore comprised a fourfold classification of powers. 1st. Over those subjects which are assigned to the exclusive plenary powers of the Dominion Parliament; 2nd. Those assigned exclusively to the Provincial Legislatures; 3rd. Subjects assigned concurrently to the Dominion Parliament and to the Provincial Legislatures; and 4th. A particular subject, namely, education, which, for special reasons, is dealt with exceptionally, and made the subject of special legislation.

To give effect to this scheme, the B. N. A. Act, in its 3rd clause, enacts that, upon proclamation being made by Her Majesty, by and with the advice of Her Majesty's Most Honourable Privy Council, within six months after the passing of the Act, the Provinces of Canada, Nova Scotia, and New Brunswick should form and be one Dominion, under the name of Canada.

Immediately upon the proclamation being issued, the above-named Provinces, by force of the above clause, became and were to all intents and purposes divested of their former existence, and became merged in the Domini n so created; and then the 5th clause, *out of the Dominion so created*, carves four subordinate creations called Provinces, and named Ontario, Quebec, Nova Scotia and New Brunswick, the two latter of which, although being conterminous with those of the extinguished Provinces of like names, merged in the Dominion, are, notwithstanding, wholly new creations, brought into existence solely by the B. N. A. Act. The executive and legislative authority of all the Provinces, as at present constituted, as well as of the Dominion, are due to the B. N. A. Act, which now constitutes the sole constitutional charter of each and every of them, and which, with sufficient accuracy and precision, as it seems to me, defines the jurisdiction of each.

The 9th section declares that the executive government and authority of and over Canada continues to be and is vested in the Queen; and as to the legislative power, the 17th section enacts that: "There shall be one Parliament for Canada, consisting of the Queen and Upper House, styled the Senate, and the House of Commons."

And the 91st section, that: "It shall be lawful for the Queen by and with the advice and consent of the Senate and the House of Commons, to make laws for the peace, order, and good govern-

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ment of Canada, in relation to all matters not coming within the class of subjects by this Act assigned *exclusively* to the Legislatures of the Provinces."

By this clause, the absolute sovereign power of legislation is vested in a Parliament consisting of the Queen, a Senate, and a House of Commons, in respect of all matters of every nature and description whatsoever, save and excepting only matters coming within the class of subjects *by the Act itself assigned exclusively* to the Legislatures of the Provinces: over all matters whatsoever, excepting only the excepted matters, the legislative power of the Dominion Parliament is made absolute.

Herein consists the great distinction between the Constitution of the Dominion of Canada and that of the United States of America —a distinction necessary in a Constitution founded upon, and designed to be similar in principle to, that of the United Kingdom of Great Britain and Ireland, but deliberately designed specially, as I have no doubt, with the view of avoiding what was believed to be a weakness and defect in the Constitution of the United States, and to have been the cause of the civil war out of which that country had then but recently emerged. Instead of a confederation of several distinct, independent States, which, while retaining to themselves sovereign power, have agreed to surrender jurisdiction over certain matters to a central government, we have constituted one supreme power, having executive and legislative jurisdiction over all matters, excepting only certain specified matters, being of a local, municipal, domestic or private character, jurisdiction over which is vested in certain subordinate bodies, termed Provinces, carved out of the territory constituting the Dominion, and which jurisdiction is subject to the control of the Dominion Executive, as the legislative power of the Dominion Parliament is itself subject to the control of Her Majesty in Her Privy Council.

All that is necessary, therefore, in order to determine whether any particular enactment is *intra* or *ultra vires* of the Dominion Parliament, is to inquire: does or does not the enactment in question deal with, or legislate upon, any of the subjects assigned *exclusively* to the Provincial Legislatures? If it does, it is *ultra*, and if it does not, it is *intra vires* of the Dominion Parliament; but lest, by possibility, doubts might arise in some cases in determining whether a particular enactment did or did not deal with any of the subjects assigned *exclusively* to the Provincial Legislatures, the 91st section, *ex majori cautelâ*, proceeds to enact:

"For greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (*notwithstanding anything in this Act*) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say: (here follow 29 items) and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Here, then, to dispel all doubts, if any should perchance arise in certain cases, and to remove all excuse for any encroachment by the Dominion Parliament upon the jurisdiction of the Local Legislatures, or for any assumption by the latter of the sovereign power and authority of the former, two tests are given by our charter for the ready determination in every case of the question, whether a particular enactment is or not *ultra vires* of the Dominion Parliament or of the Local Legislatures, namely:

First,—if to the question "Does the particular enactment deal with any of the particular subjects enumerated in the 92nd section, assigned exclusively to the Local Legislatures?" a plain answer in the affirmative or negative can be given free from any doubt,—that settles the point. If the answer be in the affirmative, the enactment in question is *beyond* the jurisdiction; if in the negative, it is *within* the jurisdiction of the Dominion Parliament.

The power to legislate upon every subject rests either in the Dominion Parliament or in the Local Legislatures; and the Act is precise, that *all matters not exclusively assigned to the Local Legislatures* fall under the jurisdiction of the Dominion Parliament.

But to remove all doubts, in case the enactment under consideration should be of a nature to raise a doubt, whether it does or not deal with one or other of the matters particularly enumerated in the 92nd section, the second test may be applied, namely: "Does the enactment deal or interfere with any of the subjects particularly, and for greater certainty, enumerated in the 91st section?" If it does, then (notwithstanding that it otherwise might come within the class of subjects enumerated in the 92nd section) it is within the jurisdiction of the Dominion Parliament, for the plain meaning of the closing paragraph of the 91st section is that, notwithstanding any thing in the Act, any matter coming within any of the subjects enumerated in the 91st section shall not be deemed to come within

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the class of subjects enumerated in the 92nd section, however much they may appear to do so.

It was argued, that what was intended by this clause was to exclude the subjects enumerated in the 91st section from a portion only of the subjects enumerated in the 91st section, namely: those only "of a local or private nature," the contention being that the 92nd section comprehends other subjects than those which come under the description of "*local or private*," and so that, in effect, the intention was merely to declare that none of the items enumerated in section 91 shall be deemed to come within item 16 of sec. 92. If this were the true construction of the clause, it would make no difference in the result, nor would it effect anything in aid of the contention in support of which the argument is used; for the previous part of the 91st section, in the most precise and imperative terms, declares that, "*notwithstanding anything in this Act*,"—notwithstanding, therefore, anything whether of a local or private nature, or of any other character, if there be anything of any other character enumerated in the 92nd section, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the class of subjects enumerated in the 91st section. But, in truth, all the items enumerated in the 92nd section are of a Provincial and domestic, that is to say, of a "local or private" nature. The frame of the 92nd section differs from that of the 91st in its form. That of the 91st is general, of the 92nd particular; but this is precisely in character with the nature of the jurisdiction intended to be given to each. By the 91st section, the Imperial Parliament unequivocally, but in general terms, declares its intention to be to place under the jurisdiction of the Dominion Parliament *all matters*, excepting only certain particular matters assigned by the Act to the Local Legislatures. This mode of expression seemed to require a particular enumeration of those subjects so to be assigned to the Local Legislatures. The 92nd section, therefore, instead of dealing with the subjects to be assigned to the Local Legislatures in the same general terms as has been used in the 91st section, by placing under the jurisdiction of those Legislatures all matters of a purely local or private nature within the Province (a mode of expression which would naturally lead to doubt and confusion, and would be likely to bring about that conflict which it was desirable to avoid), enumerates, under items numbering from 1 to 15 inclusive, certain particular subjects, all of a purely Provincial, municipal and domestic, that is to say, "of a

local or private" character, and then winds up with item No. 16—a wise precaution, designed, as it seems to me, to prevent the particular enumeration of the "local and private" matters included in the items 1 to 15 being construed to operate as an exclusion of any other matter, if any there might be, of a merely local or private nature. The wisdom of this mode of framing the 91st and 92nd sections appears when we read the items enumerated in the 91st section, some of which might be well considered to be matters which would come within some of the subjects enumerated in the 92nd section; but the scheme of the Act being to vest in the Local Legislatures all matters of a purely provincial, municipal and domestic, or "a local or private" nature, and in the Dominion Parliament all matters which, although they might appear to come within the description of Provincial, or municipal, or "local or private," were deemed to possess an interest in which the inhabitants of the whole Dominion might be considered to be alike concerned, and that, therefore, these matters should be under the control of the Dominion Parliament, in order to prevent doubt as to those matters it was, as it seems to me, a necessary and wise provision to make, that *notwithstanding anything in the Act*, and however much any of the items enumerated in the 91st section might appear to come within the subjects which, as being of a purely "local or private" nature, were enumerated in the 92nd section, yet they should not be deemed to come within such classification or description. We may, then, as it appears to me, adopt, as a canon of construction of these two sections, the rule following:

All subjects of whatever nature, *not exclusively* assigned to the Local Legislatures, are placed under the supreme control of the Dominion Parliament, and no matter is exclusively assigned to the Local Legislatures unless it be within one of the subjects expressly enumerated in section 92, *and is at the same time outside of* all of the items enumerated in section 91, by which term "*outside of*" I mean does not involve any interference with any of the subjects comprehended in any of such items.

It was argued that this rule could not be adopted as one of universal application—that it would not apply to the terms "marriage and divorce," in item 26 of the 91st section, contrasted with "*solemnization* of marriage," in item 12 of the 92nd section, but these matters respectively are placed in those sections in perfect accord with the scheme of the Act as above defined and with the above rule.

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"Solemnization of marriage," that is to say, the power of regulating the form of the ceremony—the mode of its celebration—is a particular subject expressly placed under the jurisdiction of the Local Legislatures, as a matter which has always been considered to be purely of a local character. It was a matter purely of Provincial importance whether the ceremony should take place before the civil magistrate, or whether it should be a religious ceremony; this was a matter in which the inhabitants of the different Provinces might take a different view. It was, therefore, a matter essentially to be regarded as "local," and as such to be placed under the jurisdiction of the Local Legislatures. It is, therefore, specifically mentioned as exclusively assigned to these Legislatures, but as it is the *solemnization* of the marriage which is the only matter in connection with marriage which is so exclusively assigned, then *all* other matters connected with marriage are, by the express terms of the Act, independently of the particular enumeration in the 91st section, vested in the Dominion Parliament. That there are other matters connected with and involved in the term "marriage" besides the form of the ceremony of its solemnization, there can be no doubt, as, for example, the competency of the parties to the contract to enter into it—the effect upon the status of the children, if presumed to be *de facto* entered into by persons not competent by law to enter into it—its obligatory force when entered into—the power of dissolving the tie when entered into—these are all matters which (inasmuch as the *solemnization* of the ceremony is all that is mentioned in the 92nd section in relation to marriage) would come under the control of the Dominion Parliament by the mere force of the clause which enacts that the Dominion Parliament shall have jurisdiction over all matters not exclusively assigned by the Act to the Local Legislatures, without any enumeration whatever of items in the 91st section; but, *for greater certainty*, the Act expressly mentions in the 91st section "marriage and divorce," and the *rule* taken from the Act says in effect, that these terms so used in item 26, in the 91st section, shall not be deemed to come within the term "solemnization of marriage" in item 12 of the 92nd section. The matters mentioned in these respective items are then declared to be diverse and distinct. "*Solemnization* of marriage" is, then, a matter "*outside* of" the term "marriage and divorce," in the 91st section, and the result is that the application of the rule (in perfect conformity with the theory of the scheme of the Act as above defined) leaves the power of legislating as to the form of the ceremony as a purely

local matter, under the control of the Local Legislatures, and places all other matters connected with marriage, including divorce, under the control of the Dominion Parliament.

The only question, then, which we have to consider is, does the matter which is the subject of legislation in the Canada Temperance Act, 1878, come within any of the subjects by the B. N. A. Act exclusively assigned to the Local Legislatures?

In the Court below, it seems to have been considered sufficient to make the Act to be *ultra vires* of the Dominion Parliament, if its provisions are of a nature to affect injuriously the power given to the Local Legislatures, under item 9 of section 92, to legislate in respect of "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes."

But this is clearly an erroneous view, for nothing can be more explicit than the provision of the statute which declares that, if power to legislate upon the matter in question *is not given, and exclusively given*, to the Local Legislatures, it is vested in the Dominion Parliament. One of the learned judges in the Court below seems to have inverted the rule expressly laid down in the B. N. A. Act for our guidance when he says that "Unless the power to pass the Canada Temperance Act is given *under* the *enumerated* classes of subjects exclusively assigned to Parliament, the Act is *ultra vires, as interfering with property and civil rights* in the Province, the right to legislate on which is exclusively assigned to the Local Legislatures."

The converse of this is what in fact the Act says; and although it may be admitted, that if the power to legislate upon any subject is not in the Dominion Parliament it is in the Provincial Legislatures—for all matters must come within the jurisdiction either of Parliament or of the Local Legislatures—yet the unerring test to determine whether the power to pass the Act is, or is not, vested in the Dominion Parliament is to inquire, under the application of the rule as I have above stated it, does it, or does it not, deal with a subject jurisdiction over which is given exclusively to the Local Legislatures? for, if not, it is vested in the Parliament.

Now, that the intemperate use of spirituous liquors is the fruitful cause of the greater part of the crime which is committed throughout the Dominion—that it is an evil of a national rather than of a local or Provincial character, will not, I apprehend, be denied. The

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adoption of any measures calculated to remove or diminish this evil is, therefore, a subject of national rather than of Provincial import, and the devising and enacting such measures into law, as calculated to promote the peace, order, and good government of Canada, is a matter in which the Dominion at large and all its inhabitants are concerned.

When we find, then, the design of the B. N. A. Act to be to impart to the Dominion Parliament a *quasi* national character, and to assign to the Legislatures of the Provinces carved out of and subordinated to the Dominion matters only of a purely Provincial importance, if the question, whether the power to pass such an Act as the one under consideration arose upon the construction of the Act, as if it contained the clause, that: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces"—f llowed by the enumeration of the items in the 92nd section assigned to the Local Legislatures, and without any enumeration of the items which for greater certainty have been inserted in section 91, I should have great difficulty in coming to the conclusion that, under the terms of the 13th item of section 92, namely, "property and civil rights *in the Province*," any power was given to pass such an Act as the Canada Temperance Act, 1878, which undoubtedly professes to deal with a subject of a national rather than of a Provincial import; but with the enumeration of the particular items inserted in section 91, and regarding the whole scope, object and frame of the Act, it is clear beyond all question, that the Act under considera ion is *ultra vires* of the Provincial Legislatures.

Turning to the Act, we find it to be entitled "An Act respecting the Traffic in Intoxicating Liquors;" its object, as stated in its preamble, is to promote temperance as a thing most desirable to be promoted in the Dominion; the means adopted in the Act for attaining this end consist in regulating and restraining the exercise of the trade or traffic in intoxicating liquors. Reading, therefore, the object of the Act to be as it was read in the Court below, namely, to endeavour to remove from the Dominion the national curse of intemperance, and observing that the means adopted to attain this end consist in the imposition of restraints upon the mode of carrying on a particular trade, namely, the trade in intoxicating liquors, it cannot admit of a doubt that power to pass such an Act,

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or any Act assuming to impose any restraint upon the traffic in intoxicating liquors, or to impose any rules or regulations, not merely for municipal or police purposes, to govern the persons engaged in that trade, and assuming to prohibit the sale of liquors, except under and subject to the conditions imposed by the Act, is not only not given *exclusively*, but is not *at all* given to the Provincial Legislatures. The principle of *Regina* v. *Justices of King's* (1), decided, and properly so decided, in the Court from which the appeal comes, is equally applicable to exclude from the jurisdiction of the Local Legislatures all power to pass such an Act.

The Act, then, being *ultra vires* of the Provincial Legislatures, as dealing with a subject not exclusively assigned to the Provincial Legislatures, *cadit quæstio*, for that point being so determined, it follows, by the express provision of the B. N. A. Act, that it is within the jurisdiction of the Dominion Parliament.

The Court has no jurisdiction other than is given to it by the Act of the Dominion Parliament which constitutes it, and that Act does not authorize it to assume to impose restrictions upon Parliament as to the terms, conditions and provisions to be contained in any Act passed by it upon any subject which is within its jurisdiction to legislate upon. That point being determined, the jurisdiction of Parliament as to the terms of such legislation is as absolute as was that of the Parliament of old Canada, or as is that of the Imperial Parliament in the United Kingdom, over a like subject.

What, therefore, may be the opinion of text writers, or what may be the decision of the United States Courts, as to the powers of the Central Government and Congress, or of the Legislatures of the several States, upon the like subject, is unimportant ; for, as the Dominion Government and Parliament are founded upon the model of, and made similar in principle to, those of the United Kingdom of Great Britain and Ireland, it follows that, once it is established that the subject-matter of the Temperance Act of 1878 is a matter within the jurisdiction of the Dominion Parliament to legislate upon, the provisions of that Act are as valid and binding, and beyond the jurisdiction of this Court to deal with, otherwise than by construing it, as the Temperance Act of 1864, from which the Act of 1878 is taken, was valid and binding, and beyond the jurisdiction of the Courts of Old Canada to deal with, otherwise

(1) 2 Pugsley, 535.

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than by construing, and as a similar Act in Great Britain, if passed by the British Parliament, would be valid and binding upon the Courts there.

It is unnecessary, therefore, to discuss any of the other matters relied upon in the Court below, and referred to in the argument before us, and the appeal must be allowed with costs.

Appeal allowed with costs.

SUPREME COURT OF CANADA.

THE QUEEN.....*Appellant,*

AND

CHRISTIAN A. ROBERTSON.....*Respondent.*

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Feb. 21;
April 25.

On appeal from the Exchequer Court of Canada.

[*Reported 6 Can. S. C. R. 52.*]

Fisheries, regulation and protection of—B. N. A. Act, ss. 91, 92, 109 —Property and civil rights—31 Vict. c. 60, D.

The B. N. A. Act, in assigning to the Parliament of Canada the right to legislate with respect to Sea Coast and Inland Fisheries, did not thereby give authority to deal with questions of property and civil rights, such as the ownership of the beds of the rivers or of the fisheries, or the right of individuals therein.

What the Act gave to Parliament was a right to legislate in regard to matters of national and general concern, such as the forbidding fish to be taken at improper seasons, or in an improper manner, or with destructive instruments—such general laws as are for the benefit of the public at large as well as of the owner.

Under the B. N A. Act the exclusive rights of fishing vested in the proprietors of non-navigable rivers being in every sense of the word "property" can be interfered with only by the Provincial Legislatures in exercise of the powers given to them to legislate respecting property and matters of a local or private nature.

The rights of the Provincial Governments in respect of fisheries in non-navigable waters the beds of which, not having been granted before Confederation, were then vested in the Provinces as part of the public domain, do not differ from the rights of private owners which had been acquired by grant from the Crown before that date, and a lease made by the Minister of Marine and Fisheries of a non-navigable portion of a river in the Province of New Brunswick passing partly through granted and partly through ungranted lands, was therefore held to be void.

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* Present:—RITCHIE, C.J., and STRONG, FOURNIER, HENRY and TASCHEREAU, J.J.

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Appeal from a judgment rendered by Mr. Justice Gwynne in the Exchequer Court of Canada, in the matter of the petition of right of Christian A. Robertson, the above-named respondent.

The following special case was agreed to by the parties:

"The Miramichi river at Price's Bend is about forty or forty-five miles above the ebb and flow of the tide. The stream, for the greater part, from this point upward, is navigable for canoes, small boats, flat-bottom scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

"On the 5th November, A.D. 1885, a grant issued to the Nova Scotia and New Brunswick Land Company of 580,000 acres, which included within its limits that portion of the Miramichi river which is in question, and the said grant contained, together with the usual granting clauses, the following clause:—'Excepting also out of the said tract of land described within the said bounds, all and every lot, piece and parcel of land which have been heretofore by us or our predecessors given or granted to any person or persons whatsoever, or to any body corporate, by any grant or conveyance under the Great Seal of the Province of New Brunswick, or the Great Seal of the Province of Nova Scotia during the period when the said hereby granted tract of land was part and parcel of our said Province of Nova Scotia, together with all privileges, etc., and also further excepting the bed and waters of the Miramichi river, and the beds and waters of all the rivers and streams which empty themselves either into the river St. John or the river Nashwaak, so far up the said rivers or streams

respectively as the same respectively pass through or over any of the said heretofore previously granted tracts, pieces or parcels of land hereinbefore excepted.' (Copy of grant may be referred to.)

"Copies of grants made prior to the grant to the Nova Scotia and New Brunswick Land Company, of some lots within and some immediately adjoining and outside of the boundaries of the Company's tract, to Steven Hovey, Peter Hayes, Thomas Hunter and James Young, and twelve other copies of letters patent are herewith and may be referred to. The other grants to the others within the company's tract are in similar form; copy of map annexed to the grant to the company is also filed herewith; and all are made part of this case.

"On the first day of January, A. D. 1874, the Honourable Peter Mitchell, then being the Minister of Marine and Fisheries in and for the Dominion of Canada, did, in pursuance of the powers purporting to be vested in him by the Act of the Parliament of Canada, intituled 'An Act for the regulation of fishing and protection of the fisheries,' lease to suppliant as follows:—

LEASE OF FISHERY.

"Dominion of Canada, to wit:

"Lease between Her Majesty, acting by and through the Minister of Marine and Fisheries for the Dominion of Canada, of the one part, and Christian A. Robertson, Esquire, of the city of St. John, New Brunswick, of the other part.

"Her Majesty hereby leases, for the purpose of fly-fishing for salmon, unto the said Christian A. Robertson, hereto present and accepting for himself, his heirs, executors, administrators and assigns, for and during the period hereinafter mentioned, and under the conditions hereinbelow stipulated, a certain fishing station

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situated on the south-west Miramichi River, in the Province of New Brunswick, and described as follows, that is to say: the fluvial or angling division of the south-west Miramichi river from Price's Bend to its source.

"The present lease is hereby made for and during the space and term of nine years, to be computed and reckoned from the first day of January, one thousand eight hundred and seventy-four, until the thirty-first day of December, which will be in the year of our Lord one thousand eight hundred and eighty-two, and on the following conditions:—

"1st. That the said lessee shall pay to Her Majesty, into the hands of the Minister of Marine and Fisheries for the time being, or such other person or persons duly authorized to receive the same, an annual rent of fifty dollars currency, the said rent payable annually in advance.

"2nd. That the said lessee shall, in the use and occupation of the fishery station and privileges hereby leased, and the working of the same, in every respect conform to all and every the provisions, enactments and requirements of the fishery laws now, or which may hereafter be in force, and comply with all rules and regulations adopted or to be passed by the Governor General in Council relative thereto.

"3rd. That the lessee shall neither concede nor transfer any interest in the present grant, nor sub-let to any one without first duly notifying the Department of Marine and Fisheries, and receiving the written consent of the Minister thereof, or some other person or persons authorized to that effect. Provided always that actual settlers shall enjoy the privilege of fishing with a rod and line, in the manner known as fly surface-fishing, in front of their own properties.

"4th. That the said lessee shall not have any right, claim or pretension to any indemnity or abatement of

rent by reason of a decrease or failure in the fishery by these presents leased.

"5th. That in default of payment by the said lessee of the rent as hereinbefore stipulated, or by his neglect, default or evasion, failure or refusal to fulfil any of the other clauses and conditions of this lease, the same may, at the option of the lessor, be at any time determined and put an end to upon notice thereof to the said lessee by letter posted to him to the post office nearest to the said premises, or by personal notice through any overseer of fisheries for the Province of New Brunswick, or other person by the Minister of Marine and Fisheries deputed for the purpose, and the said lease shall become absolutely void, and the Crown may thereupon enter into possession and enjoyment of the said station and privileges without any indemnification for improvements or recourse to law, and re-let the same; the said lessee being moreover held bound and liable for all loss or damage which might accrue or arise to the Crown by reason of receiving a lower rent, or being unable to re-lease the premises and privileges appertaining thereto or otherwise.

"6th. That the said lessee binds himself to establish and maintain efficient private guardianship upon the said stream throughout each season, to the satisfaction of the lessor, who reserves the right of four rods.

"This said lease (in duplicate) made and passed on the thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy-three, in presence of the undersigned witnesses.

"P. MITCHELL,
Minister of Marine and Fisheries.

"Witness: S. P. BAUSET.

"Countersigned. "W. F. WHITCHER,
Commissioner of Fisheries.

Witness: W. H. VENNING. "C. A. ROBERTSON.

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"It is admitted for the purpose of this case:

"1. That the Government of Canada did not own the lands adjoining the said river within the limits of the said lease.

"2. That the said lease includes all that portion of the south-west Miramichi river included in the lands of the aforesaid grant to the Nova Scotia and New Brunswick Land Company; and also the remainder of the river above the said grant up to its source, which last portion of the river passes through ungranted land, and is of comparatively little value for the purpose of salmon fishing. That the said river for several miles up the stream, and above and below the lots and parcels of land previously granted to the said Nova Scotia and New Brunswick Land Company, and excepted in the said grant, is within the boundaries of the land described in the said grant. That under the said lease the suppliant entered upon the said fluvial division so leased to him, and paid the annual rent, and fulfilled and performed all the conditions and agreements and provisions in the said lease contained on his part and behalf to be kept, fulfilled, and performed.

"3. That although the suppliant under the said lease claimed to be in occupation of the said fishery station described in aforesaid lease, and to have the exclusive right of fishing therein, and that subject to the reservations in the said lease he had the right of preventing all persons from fishing for salmon within the bounds of the said fishery station, James Steadman and Edgar Hanson, who were not actual settlers, and who did not have or claim to have any lease, license or permission so to do from the Minister of Marine and Fisheries, or from the suppliant, did (with the permission and consent of and under and by virtue of conveyances from the said Nova Scotia and New Brunswick Land Company of land,

including a portion of the said river above the aforesaid grants so excepted and reserved in said grant to the Company), during the year 1875, and during the season when fly-fishing was lawful, enter upon the said portion of the river, being a part of the river so leased as aforesaid, and fished for and caught salmon by fly-fishing against the will of suppliant and against his consent.

"4. That in order to maintain his rights and privileges, and the right of fishing purporting to be granted and demised to the suppliant by the said lease, the suppliant prevented the said James Steadman and Edgar Hanson from fly-fishing.

"5 That the said James Steadman and Edgar Hanson respectively brought actions against the suppliant and his servants for and by reason of such prevention from fishing, as above stated, and such proceedings were thereupon had that the said James Steadman and Edgar Hanson recovered against the suppliant damages and costs, which the suppliant has been obliged to pay, and that the Supreme Court of New Brunswick on appeal (see *Steadman* v. *Robertson et al.*, and *Hanson* v. *Robertson et al.* (1),) held that the Minister of Marine and Fisheries had no right or power to issue the said fishery lease, and that the same was null and void.

"6. That in and about the defence of the said actions the suppliant also incurred costs and expenses.

"7. That also by reason of the premises the suppliant has sustained other loss and damage.

"8. That in establishing and maintaining efficient private guardianship upon the said stream through the season, required by the said lease, the suppliant has also expended money.

"9. That the suppliant therefore prays that Her Majesty will be pleased to do what is right and just in

(1) 2 Pug. & B. 580.

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the premises, and cause the suppliant to be reimbursed and compensated for the moneys so expended by him as aforesaid, and for the losses, damages and injuries sustained by him as aforesaid.

"10. It is agreed that the statements above set out are admitted for the purpose of this special case, and are to be used for the purpose of enabling the court to decide the questions of law raised hereby.

"11. It is also agreed that either party may appeal from the judgment to be pronounced in the above case as upon a demurrer.

"The following questions are therefore submitted for the decision of the court:—

"1. Had the Parliament of Canada the power to pass the 2nd section of the said Act entitled 'An Act for the regulation of fishing and the protection of the Fisheries?'

"2. Had the Minister of Marine and Fisheries the right to issue the fishery lease in question?

"3. Was the bed of the south-west Miramichi within the limits of grant to the Nova Scotia and New Brunswick Land Company, and above the grants mentioned and reserved therein, granted to the said company?

"4. If so, did the exclusive right of fishing in said river thereby pass to the said company?

"If the bed of the river did not pass, had the company, as riparian proprietor, the right of fishing *ad filum aquæ*; and if so, was that right exclusive?

"6. Have the grantees, in grants of lots bounded by said river, or by any part thereof, and excepted from the said company's grant any exclusive or other right of fishing in said river opposite their respective grants?

"7. If an exclusive right of fishing in a portion of the Miramichi river passed to said company, or to the grantees in the excepted grants, or any of them, could

the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the river?

"5. Where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?

"9. It is understood and agreed, that if upon the final determination of the case it be held that the Government had no power to make the lease in question to Mr. Robertson, an order shall be made referring it to the proper officer of the court, to take an account of the expenses actually and properly incurred by Mr. Robertson, in connection with the suits in the courts of New Brunswick, and such other actual expenses as he may have been put to on account of the action of the parties who intercepted the rights claimed by him under the lease; and it is further understood and agreed that the Government shall pay to Mr. Robertson such of these expenses as the court may think him entitled to, in case the parties to this suit may differ upon the matter."

The case was argued in the Exchequer Court for the suppliant by Mr. *Haliburton*, Q. C., and for the Crown by Mr. *Lash*, Q. C., and on the 7th October, 1880, judgment was delivered by Gwynne, J.,* in favour of the suppliant.

The following rule was taken out:—

"The special case stated by the parties for the opinion of this court having come on to be heard and debated before this court in the presence of counsel for the suppliant and for Her Majesty: Upon debate of the matter, and hearing what was alleged by counsel on each side, and upon reading the documents and papers filed, this court did order that the said case should stand over for judgment; and the same coming on this day for judgment this court doth order and declare that the first, third,

* *Post*, p. 116.

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fourth, and sixth questions submitted in said special case should be answersd in the affirmative, and the second and seventh questions in the negative. This court doth further declare that it is unnecessary to give any special answer to the fifth question, as this court is of opinion that the bed of the south-west Miramichi river, within the limits of the grant to the Nova Scotia and New Brunswick Land Company, and above the grants mentioned and reserved therein, did pass to the said company.

"This court doth further declare, with reference to the eighth question, that if what is meant by this question be whether the Minister of Marine and Fisheries could lawfully issue a lease of the bed of the river where it passes through ungranted lands, this court is of opinion that the said Minister could not lawfully issue such lease; but this court is of opinion that the said Minister could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river."

Mr. *Lash*, Q. C., for the Crown, moved, pursuant to Rule No. 231 of the Exchequer Court Rules, for an order *nisi* calling upon the suppliant to shew cause why the judgment rendered by the court upon the special case in this matter should not be reviewed and judgment given thereon for the Crown, upon the grounds that the second question submitted in said special case should have been answered in the affirmative, and that the third, fourth, fifth and sixth questions should have been answered in the negative. This motion was refused.

From this decision the Crown appealed.

Mr. *Lash*, Q. C., for the Crown:

In this appeal the appellant will raise only the main question involved, viz., whether or not an exclusive right of fishing, at the time the fishing lease was granted to

the respondent, previously existed by law in the leased portion of the river. The reason the eighth question was submitted for the decision of the Exchequer Court was, that we thought part of the *locus in quo* was through ungranted land, and it has since been ascertained that no part of the *locus in quo* is through ungranted land.

Had the Minister of Marine and Fisheries power to issue the lease in question?

This depends on there being no exclusive right of fishing, at the time the lease was made, in the leased portion of the river.

An exclusive right of fishing may exist, 1st, in a private river; 2nd, in a public river.

The first paragraph of the special case shows what the nature of that portion of the Miramichi river is: "It is above tidal waters, and is navigable for canoes and boats and has been used from the earliest settlement of the country as a highway for the same, and for the purpose of floating down timber and logs to market." My contention is shortly this, that in this country the absence of the ebb and flow of the tide does not make a river a private one—if the contrary is held, then all the great fresh water rivers in Canada are private—and that this river, being admitted to be navigable for the purposes of passage, and being used as a highway, is a public river, and no exclusive right of fishing exists in it, as no grant or prescription thereof is shewn: 2 Broom & Hadley's Com. (edition of 1869), page 107; 2 Stephen's Com. (1874), pages 670-2; 2 Kerr's Blackstone (1857), page 39; *Warren* v. *Mathews* (1).

If the Miramichi be a private river, it may be admitted that the owner would have the exclusive right of fishing.

Is it a private river? Ebb and flow of the tide is not the proper test: *Lyon* v. *Fishmongers' Co* (2); *Mayor*

(1) 6 Mod. 73.

(2) 1 App. Cas. 662.

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of Colchester v. Brooke (1); Carter v. Murcot (2), confirming Warren v. Mathews; Genesee Chief v. Fitzhugh (3), confirmed by Jackson v. Steamboat Magnolia (4); Broom & Hadley, Stephen, and Kerr, above mentioned; Mayor of Lynn v. Turner (5); Miles v. Rose (6).

The navigable capacity need not continue throughout the whole year: Olson v. Merrill (7).

I do not agree that the bed of the river did not pass, and I can only argue on the assumption that the terms of the special case make the Miramichi a highway and a public river, and if so no exclusive right of fishing exists in it: Thomson's Essay on Magna Charta (8); Mayor of Colchester v. Brooke (9); Duke of Somerset v. Fogwell (10); also references to Broom & Hadley, Stephen, and Kerr, above mentioned.

In England it is well settled that in a navigable river there can be no exclusive right of fishing unless such right existed prior to Magna Charta.

But it is contended by respondent that a navigable river is in law navigable only as far as the tide ebbs and flows, and that though navigable in fact above tide water, it is not navigable in law, and that, therefore, the incidents attaching to a river navigable in law do not attach to one navigable only in fact.

The appellant denies this contention; but even if such be law in England it is not law in Canada, as the size and situation of the two countries are so different.

In New Brunswick only so much of the law of England as was applicable to the circumstances of the Province when it was first created is in force.

In England, where navigation was practically confined

(1) 7 Q. B. 339, 373.
(2) 4 Burr. 2162.
(3) 12 Howard, 443.
(4) 20 Howard, 296.
(5) 1 Cowp. 86.
(6) 5 Taunt, 705.
(7) 42 Wisc. 203.
(8) Page 203.
(9) 7 Q. B. 382.
(10) 5 B. & C. 875, 881.

to the tidal portion of a river—where, in fact, navigable water and tide water were synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers as contra-distinguished from private ones—it was reasonable enough that the ebb and flow of the tide should have been taken as the test of the navigability of a river, as it was the most convenient test, but such a test was and is inapplicable to this country, and was not imported here as part of the common law.

Waters here navigable in fact are so regarded in law, without reference to the ebb and flow of the tide, and if a river be navigable in law all the incidents of navigability attach to it, and one of those incidents is the right of the public to fish therein: see *Atty.-Gen.* v. *Harrison* (1); *Carson* v. *Blazer* (2); *McManus* v. *Carmichael* (3).

(THE CHIEF JUSTICE:—Is there any objection in holding that a river may be public for certain purposes and private for all other purposes?)

So far as this river is concerned there is none, and where there is no exclusive right to fish, then Parliament can take away the public right by statute, as was done by the Fisheries Act.

The learned counsel referred to Robinson & Joseph's Digest (Ont.) Title, "Water;" *People* v. *Canal Appraisers* (4); *Ball* v. *Herbert* (5); *Dixson* v. *Snetsinger* (6).

Mr. *Weldon*, Q.C., for respondent:

It has been admitted that according to the English cases the decision of Mr. Justice Gwynne must be affirmed. This is practically an appeal from the judgment of the Supreme Court of New Brunswick, which has held that this was a private river, and that the license issued by

(1) 12 Grant, 466, 470.
(2) 2 Binney, 475.
(3) 3 Iowa, 1, 52.
(4) 6 Tiffany, 461.
(5) 3 Taunt. 267.
(6) 23 U.C.C.P. 235.

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the Minister of Marine and Fisheries of the *locus in quo* is void.

Rivers may be divided into three classes:

I. When they are altogether private, such as shallow streams, not capable of being put to any particular use.

II. When they are private property, but capable of, and subject to, the public use. The case of non-tidal waters.

III. Where the use and property are public, where the tide ebbs and flows.

By the 2nd section of 31 Vict. c. 60, the power to grant leases is given only where the exclusive right does not already exist by law. It is submitted that the exclusive right did exist in the Nova Scotia and New Brunswick Land Company, under the grant. The river is clearly within its boundaries, and the exception shews the intention of the Crown to include it in the grant, except where already granted.

In non-tidal rivers, the right of the riparian proprietors extends to the middle of the stream, and where both banks are the property of the same owner, the whole right of property in the stream belongs to him: *Bickett* v. *Morris* (1).

On page 58, Lord Cranworth says: "By the law of Scotland, as by the law of England, when the lands of the two conterminous proprietors are separated from each other by a running steam of water, each proprietor is *prima facie* owner of the soil of the *alveus* or bed of the river *ad medium filum aquæ*."

In navigable rivers or arms of the sea, fishing is common and public. In private rivers, not navigable, it belongs to the lords of the soil on each side: *Carter* v. *Murcot* (2); *Malcomson* v. *O'Dea* (3); *Marshall* v. *Ulleswater Steam Navigation Company* (4).

(1) L. R. 1 H. L. Sc. 47.
(2) 4 Burr. 2162.
(3) 10 H. L. 593.
(4) 3 B. & S. 732.

The rights of riparian proprietors are very fully discussed in the case of *Lyon* v. *Fishmongers' Co.* (1) and *Byron* v. *Stimpson* (2).

The petitioners also rely upon the judgments of the Supreme Court of New Brunswick in *Robertson* v. *Steadman* (3), and the cases therein cited.

As to the construction of "sea coast and fisheries," see remarks of Lord Selborne in *L'Union St. Jacques de Montreal* v. *Belisle* (4).

Even assuming that the land in these rivers is vested in the Crown, it is contended that the Crown only held it in trust for the people of New Brunswick.

By the B. N. A. Act, secs. 109 and 117, the Crown lands of the Province of New Brunswick are the property, so to speak, of the Province, and therefore the incidents of right appurtenant to the property belong to the Province, otherwise this anomaly would exist, that while the lands were ungranted, the Dominion of Canada would have the right to dispose of or lease the fishery, but so soon as a grant was made under the Great Seal of the Province of New Brunswick, then it would belong to the grantee.

This point is put forcibly by his Honour Mr. Justice Fisher, in the case of *Robertson* v. *Steadman* (3), in his dissenting opinion.

It is submitted, then, that by law, within the limits of the fluvial or angling division described in the lease to the petitioner, the exclusive right of fishing existed, and therefore that the Dominion of Canada had not, under the Act of Union, nor under the Act of the Parliament of Canada 31 Vict. c. 60, power to grant such lease, and therefore the same became null and void, and the peti-

(1) 1 App. Cas. 662.
(2) 1 Pug. & B. 697.
(3) 3 Pugsley, 621.
(4) L. R. 6 P. C. 31, 37.

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tioner being damnified has a claim upon the Government for the damage sustained.

Mr. *Lash*, in reply.

RITCHIE, C.J. (after reading the statement of the case, proceeded as follows):—

As the lease in question professes to deal only with the right of fishing in that part of the Miramichi river described as "the fluvial or angling division of the south-west Miramichi river from Price's Bend to its source," we are relieved from the necessity of considering in whom the rights of fishing are in the Miramichi river from or below Price's Bend to its mouth, it being described in the case as being:—"After the St. John, the largest river in New Brunswick is the Miramichi, flowing northward into an extensive bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels twenty-five miles from the gulf, and for schooners twenty-five miles further to the head of the tide, above which for sixty miles it is navigable for tow-boats. The river has many large tributaries spreading over a great extent of country."

From Price's Bend to its source the river is thus described:—"Price's Bend is about forty or forty-five miles above the ebb and flow of the tide. The stream, for the greater part, from this point upward, is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand."

The questions involved in the case submitted, resolve themselves substantially into these:—

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What are the rights of fishing in a river or a portion of a river, such as is that part of the Miramichi from Price's Bend to its source? Do the rights of property therein belong to the Provincial Government, or their grantees, or to the Dominion Government or their licensees, or have the Dominion Government, or the Provincial Government, legislative control over such proprietary rights? And is there any distinction between the rights of the grantees from the Provincial Government before Confederation or after, and of the Provincial Government itself? That is, assuming the Dominion Government cannot deal with or take away the rights of the grantees of the Crown before Confederation, can they do so in respect to the ungranted lands of the Provinces granted since Confederation? In other words, can the Dominion Parliament authorize the Minister of Marine and Fisheries to issue licenses to parties to fish in rivers such as that described, where the lands are ungranted, or where the Provincial Government has before or after Confederation granted lands that are bounded on or that extend across such rivers?

It is difficult, if not impossible, satisfactorily to deal with this case and ignore any of these questions, the principles applicable to and governing all being the same, and therefore their determination will consequently answer all the questions submitted and settle this appeal.

The observations I am about to make are designedly confined to rivers such as the Miramichi, from Price's Bend to its source.

In construing the B. N. A. Act, I think no hard and fast canon or rule of construction can be laid down and adopted by which all Acts passed as well by the Parliament of Canada as by the Local Legislatures upon all and every question that may arise can be effectually tested as to their being or not being *intra vires* of the Legislature

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passing them. The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the B. N. A. Act, is what I suggested in the cases of *Valin* v. *Langlois* (1) and *The Citizens' Insurance Co.* v. *Parsons* (2), with respect to property and civil rights, over which exclusive legislative authority is given to the Local Legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the Local Legislatures must, to a certain extent, be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the Local Legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised, so far as may be, consistently with the rights of the Local Legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada. And this view I think was clearly in the mind of the Privy Council when in *Cushing* v. *Dupuy* (3), in speaking of the powers of the Dominion and Provincial Legislatures, it is said in the judgment of the Privy Council by Sir M. E. Smith :—" It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, *so far as a general law relating to those subjects might affect them.*"

(1) 3 Can. S. C. R. 1, 15 ; *ante* vol. 1, p. 158.
(2) 4 Can. S. C. R. 215, 242 ; *ante* vol. 1, p. 265.
(3) 5 App. Cas. 409, 415 ; *ante* vol. 1, p. 258.

And this view is, I venture to think, substantially endorsed by the Privy Council in the case of *Parsons* v. *The Citizens' Insurance Co.* (1), decided in November last. There the Privy Council say as to the provisions of the B. N. A. Act, 1867, relating to the distribution of legislative powers between the Parliament of Canada and the Legislatures of the Provinces, that owing to the very general language in which some of these powers are described, the question is one of considerable difficulty; and after referring to the first branch of section 91, the Privy Council say:—"An endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, 'for greater certainty, but not so as to restrict the generality of the foregoing terms of this section,' that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of sect. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to number 16 of sect. 92.

"Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, *it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament.*"

And then we find language which I humbly think sanctions to its fullest extent the principle I have heretofore ventured to promulgate as applicable to the B.N.A. Act in this admittedly most difficult question:—"With

(1) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

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regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the Legislatures of the Provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."

And saying they find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights," and that the words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in any of the enumerated classes of subjects in section 91, they add this important proposition bearing on the case in hand as applicable to "Property and Civil Rights:"—"It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the

other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited."

After referring to the 14 Geo. 3, c. 83, which made provision for the government of the Province of Quebec, and by section 8 of which it was enacted, that His Majesty's Canadian subjects within the Province of Quebec should enjoy their property, usages and other civil rights as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws, they say:—"In this statute the words 'property' and 'civil rights' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one."

And after instancing the subject of marriage and divorce in section 91, and observing "it is evident that solemnization of marriage would come within this general description; yet 'solemnization of marriage in the Province' is enumerated among the classes of subjects in section 92," the Privy Council say:—"No one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the Legislatures of the Provinces. So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in section 91; but though the description is sufficiently large and general to include 'direct taxation within the Province in order to the raising of a revenue for Provincial purposes,' assigned to the Provincial Legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one."

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Let us now refer to the sections of the B. N. A. Act bearing on the present case, and guided by considerations such as these, I think the Act can be so read as to avoid all conflict, and give to each legislative body the full legislative and proprietary rights intended to be conferred by the Imperial Parliament.

By section 91, sub-s. 12, is confided to the legislative authority of the Dominion Parliment, "Sea coast and inland Fisheries;" to the exclusive power of the Provincial Legislatures by section 92, sub-s. 13, "Property and civil rights in the Province;" and by sub-s. 16, "Generally all matters of a merely local or private nature in the Province;" and by section 108 certain public works and property specified in schedule 3 are declared to be the property of Canada; and by section 109, all lands, mines, minerals and royalties belonging to the several Provinces shall belong to the several Provinces in which they are situate, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same; and by section 92, sub-s. 5, the exclusive power of legislation is conferred on the Provincial Legislatures in relation to "the management and sale of the public lands belonging to the Province, and of the timber and wood thereon."

I am of opinion that the Miramichi, from Price's Bend to its source, is not a public river on which the public have a right to fish, and though the public may have an easement or right to float rafts or logs down, and a right of passage up and down in canoes, etc., in times of freshet in the spring and autumn, or whenever the water is sufficiently high to enable the river to be so used, I am equally of opinion that such a right is not in the slightest degree inconsistent with an exclusive right of fishing, or with the rights of the owners of property opposite their respective lands *ad medium filum aquæ*; or, when the

lands on each side of the river belong to the same person, the same exclusive right of fishing in the whole river so far as his land extends along the same. There is no connection whatever between a right of passage and a right of fishing. A right of passage is an easement, that is to say, a privilege without profit, as in a common highway. A right to catch fish is a profit *à prendre*, subject, no doubt, to the free use of the river as a highway and to the private rights of others. The right of private property in rivers such as that portion of the Miramichi we are dealing with has always been recognised at common law.

In *Hudson* v. *MacRae* (1), "an information before two justices for unlawfully and wilfully attempting to take fish in water where another person had a private right of fishery, the accused justified under a supposed right on the part of the public to fish in that water.

"It was conceded such a right of fishing by the public in a non-navigable river could not exist in law," and "held that accused, justifying himself under the *bona fide*, though mistaken notion, of such a right, did not make such a claim of right as ousted the jurisdiction of the justices."

Blackburn, J., says:—"It appears that the appellant was fishing in a private river with every circumstance necessary to warrant conviction: but he shewed in his defence that for many years the public at large fished there under the notion of a right. The justices have found that he acted under the *bona fide* belief in that right, *but then in point of law* such a right could not be obtained in a non-navigable river."

If the title to the property comes in question, the justices must hold their hands.

Blackburn, J, says:—"But when the claim set up is of a right which could by no possibility exist, it cannot

(1) 4 B. & S. 585.

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be said that the right of property comes in question; there is then nothing more than this, that the man has got in his head an unfounded notion of a right impossible in law. . . . Here is a non-navigable river where the public could not possibly have a right of fishing."

Race v. *Ward* (1), declaration for breaking and entering plaintiff's close and committing trespass. Defendant justified under an immemorial custom for all inhabitants for the time being of said township to have liberty and privilege to have and take water from a certain spring in said close, etc.

Lord Campbell, C. J., says:—"In *Wickham* v. *Hawker* (2) the Court of Exchequer held that 'a liberty, with servants or otherwise, to come into and upon "lands," and there to hawk, hunt, fish and fowl,' is a profit *a prendre* within the Prescription Act, 2 & 3 Wm. 4, c. 71.

. . . . . .

"We held, last term, that to a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the inhabitants of the parish to angle and catch fish in the *locus in quo*, was bad, as this was a profit *a prendre*, and might lead to the destruction of the subject-matter to which the alleged custom applied."

Case referred to was *Bland* v. *Lipscombe* (3).

Lord Campbell, C. J.:—"We must act upon that salutary law which distinguishes between a mere easement and the right to take a profit. . . . .

It is clear to me that the custom claimed on this plea is to angle for, catch, and carry away the fish; but supposing it were limited, as Mr. Brown argues, to a claim to angle for and catch the fish without claiming a right to carry them away, I think it would be equally destructive of the subject-matter, and bad."

(1) 4 E. & B. 702. (2) 7 M. & W. 63. (3) 4 E. & B. 713, note.

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Mussett v. *Burch* (1) decides that "the right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law."

Cleasby, B., says:—"Now it appears to me that the case in the Irish Reports (*Murphy* v. *Ryan*) is decisive on the point before us. It expressly decides that 'the public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow.'"

Grove, J.:—"Mr. Graham has not shewn us any case in which the public have been held to have a right of fishing in a river merely because it is navigable, or navigated by boats."

In *Wishart* v. *Wyllie* (2), the Lord Chancellor laid it down that the law on this subject admitted of no doubt. "If," said his lordship, "a stream separates properties A and B, *prima facie*, the owner of the land A, as to *his* land, on one side, and the owner of the land B, as to *his* land, on the other, are each entitled to the soil of the stream, *usque ad medium aquæ*, that is *prima facie* so. It may be rebutted: but, generally speaking, an imaginary line running through the middle of the stream is the boundary, just as if a road separates two properties, the ownership of the road belongs half way to one and half way to the other. It may be rebutted by circumstances, but if not rebutted, that is the legal presumption. Then if two properties are divided by a river, the boundary is an imaginary line in the middle of that river; but to say that the whole of the river is a sort of common property, which belongs to no one, is not a correct view of the case."

In *Murphy* v. *Ryan* (3), O'Hagan, J., said:—"According to the well-established principles of the common law, the proprietors on either side of a river are

(1) 35 L.T.N.S. 486.

(2) 1 Macq. H. L. Cas. 389.

(3) Ir. R. 2 C. L. 143.

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presumed to be possessed of the bed and soil of it moietively, to a supposed line in the middle, constituting their legal boundary; and, being so possessed, have an exclusive right to the fishery in the water which flows above their respected territories, though the law secures to the community the right of navigation upon the surface of the water, as a public highway which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river, or dealing with the water to the injury of their neighbours." . . . . .

"But, whilst the right of fishing in fresh water rivers, in which the soil belongs to the riparian owners, is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and to belong to all the subjects of the Crown—the soil of the sea and its arms and estuaries, and tidal waters being vested in the Sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship, in the soil of the private river by the private owner, and by the Sovereign in the public river respectively."

. . . . . .

"Upon a full consideration of all the cases, it will, I think, appear that no river has ever been held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *prima facie* in the riparian owners, and the right of fishing private."

. . . . . .

"But no usage can establish a right to take a profit in another's soil, which might involve the destruction of his property; and such a profit would be the taking of fish. The precise point is decided both as to the general law, and the particular case of profit by fishing, in *Bland* v. *Lipscombe* (1); and the principle of that case, in affirmation of the ancient doctrine, is sustained by the judgments in *Lloyd* v. *Jones* (2); *Race* v. *Ward* (3); *Hudson* v. *MacRae* (4), and other recent decisions. That principle is beyond controversy; and, therefore, the usage relied on in this defence, cannot sustain the claim of the right in the public to fish in a river, the soil of which is not *publici juris*, but private property."

In *Lyon* v. *Fishmongers' Co.* (5), Lord Cairns says:—"The late Lord Wensleydale observed, in this House, in the case of *Chasemore* v. *Richards* (6), 'The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing.'"

In *Marshall* v. *Ulleswater Steam Navigation Co.* (7), it was held that "the allegation of a several fishery, *prima facie*, imports ownership of the soil; per Wightman and Mellor, JJ.; Cockburn, C.J., dissenting, but holding this court (Q. B.) bound by the authorities to that effect."

Wightman, J., delivering judgment, referring to *Holford* v. *Bailey* (8) says:—"These decisions are in conformity with the rule stated in the later editions of Blackstone's Commentaries, vol. 2, p. 39. 'He that has a several fishery must also be (or at least derive his right from) the owner of the soil.'"

(1) 4 E. & B. 713, note.
(2) 6 C. B. 81.
(3) 4 E. & B, 702.
(4) 4 B. & S. 585.
(5) 1 App. Cas. p. 673.
(6) 7 H. L. C. 382.
(7) 3 B. & S. 732; affiirmed 6 B. & S. 570.
(8) 13 Jur. 278; 13 Q. B. 426; 18 L. J. Q. B. 109.

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Cockburn, C.J., says:—"The use of water for the purpose of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter. On a grant of the land, the water and the incidental and accessory right of fishing would necessarily pass with it."

Previous to Confederation many enactments were passed by the Legislature of New Brunswick for the general regulation and protection of the fisheries in that Province, but no Act, I will undertake with confidence to assert, can be found in the statute books of New Brunswick, from the date of the erection of the Province to the day of Confederation, taking away or interfering with (except as such general regulations might interfere with) the private rights of the individual proprietors of lands through which such rivers run, still less to take from them the enjoyment of their rights of fishing and to authorize the leasing of the same to others, to the exclusion of the owner. But the Legislature did authorize the Governor-in-Council to grant leases or licenses for fishing purposes in rivers and streams above the tidal waters of such streams or rivers when the same belonged to the Crown, or the lands were ungranted; but the Provincial Legislature, having a just regard for private rights, specially provided that the rights of parties in lands and privileges already granted should not be affected thereby, recognising the rights of individuals in the fisheries in rivers above tidal waters, and the right of the Province to the fisheries in rivers through the ungranted lands of the Province. The reason why there was any legislation on this matter of leasing (for the Executive Government might have granted such leases without legislative authority) is to be found on the face of the Act—viz., to regulate the sale and provide for the disposal of the proceeds, by enacting that such leases or

licenses to be issued by the Governor-in-Council should be sold by public auction after thirty days' notice in the *Royal Gazette*, an upset price being determined by the Governor-in-Council, and that the rents and profits accruing from such leases or licenses should be paid into the Provincial Treasury to a separate account to be kept, called "The Fishery Protection Account."

Such being the state of matters at the time of Confederation, I am of opinion that the legislation in regard to inland and sea fisheries contemplated by the B. N. A. Act was not in reference to "property and civil rights" —that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern, and important to the public, such as the forbidding fish to be taken at improper seasons, in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the Local Legislatures were, previously to and at the time of Confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the Province or the individual as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parlia-

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ment to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging at the date of Confederation either to the Provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefor large rentals which most unequivocally proceed from property, or from the incidents of property in or to which the Dominion has no shadow of claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth. Nor can I discover the most remote indication of an intent to deprive either the Provinces or the individuals of their proprietary rights in their respective properties; or, in other words that it was intended that the lands and their incidents should be separated, and the lands continue to belong to the Provinces and the Crown grantees, and the incidental right of fishing should belong to the Dominion, or be at its disposal. I am at a loss to understand how the Dominion, which never owned the land, and therefore never had any right to the fishing as incidental to such ownership, without any grant, statutory or otherwise without a word in the statute indicating the slightest intention to vest the rights of property or of fishing in the Dominion, without a word qualifying or limiting the right of property of the Provinces in the public lands, can now successfully claim to have a beneficial interest in those fisheries, and authority to deal with such rights of fishing as the property of the Dominion, and claim to rent or license the same at large yearly rents, and appropriate the proceeds to Dominion purposes. I had formerly occasion to point out that the public works and property of each Province, which it was intended should be the property of Canada, were enumerated in the third schedule, and that neither by express words nor by the

most forced construction could the slightest inference be drawn that the public lands of the Provinces, or their incidents, were intended to be vested in the Dominion, and that the express words of section 117 as clearly and unequivocally established that the Provinces were to retain all their respective public property not otherwise disposed of by the Act, and that, as if to place the question beyond a peradventure, section 109 provided that all lands, mines, etc., belonging to the several Provinces of, etc., and all sums then due and payable for such lands mines, etc., should belong to the several Provinces in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

I reiterate what I on a former occasion intimated, that at the time of the union the entire control, management and disposition of the Crown lands, and the proceeds of the public domain, were confided to the executive administration of the Provincial Governments, as representing the Crown, for the benefit of the Provinces respectively, and to the legislative actions of the Provincial Legislatures; so that the Crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective Provinces in which they were situate; and this property, the Imperial Act, by clear, unambiguous language, has, as we have seen, declared shall after Confederation continue to be the property of the Provinces; and I cannot discover any intention to take from Provincial Legislatures all legislative power over property and civil rights in fisheries, such as we are now dealing with, and so give to the Parliament of Canada the right to deprive the Province or individuals of their right of property therein, and to transfer the same or the enjoyment thereof to others, as the license in question affects to do.

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To all general laws passed by the Dominion of Canada regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the Local Legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the Local Legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before Confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the Province, inasmuch as such laws need have no connection or interference with the right of the Dominion Parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the Parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the Provincial Legislatures, thus satisfactorily, to my mind, reconciling the powers of both Legislatures without infringing on either.

As a necessary consequence of what I have said, the Minister of Marine and Fisheries has no authority to issue a lease of the bed of such a river as this where it

passes either through ungranted or granted lands, and I have an equally strong opinion that the Dominion Parliament has no legislative power or authority to authorize him to issue, as against the owner, a license to fish as a franchise or right apart from the ownership of the soil, whether owned by the Province or an individual. I am at a loss to conceive how it is possible for the Minister to have that power over lands owned by the Province, and not have the same power over lands owned by private individuals. The franchise or right is in the private individual by virtue of his property in the bed of the stream, and this he obtains by virtue of the grant from the General Government; why then should the Province not have the same franchise or right by virtue of its property in the soil, bank and bed of the river?

Unquestionably the right of fishing may be in one person, and the property in the bank and soil of a river in another; but can there be a doubt that if a man owning land on the bank of a river, with right to the bed of the river extending to the centre of a stream opposite such land, conveys without reservation or exception the land bounded by the stream, that the right of fishing goes with it? But what is there in the B. N. A. Act to give the slightest countenance to the idea that any such separation of the right to lands and to the fishery incidental to the land was contemplated, and that while the public lands were retained to the Provinces, rights of fishing connected therewith and incident thereto were to become separate and distinct, the one from the other, and the fishing taken from the Provinces and transferred to the Dominion?

Can it be disputed that, under the 109th section, the banks and beds of all such ungranted rivers and streams belong to the several Provinces? Where then do we get any language severing the right to the fisheries from the

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property or title to the soil or bed of these rivers, or altering in any way the title or ownership of the lands, including the banks and beds of rivers passing through them, or any of the rights incident to the same?

I think Mr. Justice Fisher, in *Steadman* v. *Robertson* (1), took a correct view of the law. I have arrived at like conclusions, viz.: that it was not the intention of the B. N. A. Act, 1867, to give the Parliament of Canada any greater power than had been previously exercised by the separate Legislatures of the Provinces; that is, the general power for the regulation and protection of the fisheries; that the Act of the Parliament of Canada, 31 Vict. c. 60, recognises that view, and, while it provides for the regulation and protection of the fisheries, it does not interfere with existing exclusive rights of fishing, whether Provincial or private, but only authorizes the granting of leases where the property and therefore the right of fishing thereto belongs to the Dominion, or where such rights do not already exist by law; that the exclusive right of fishing in rivers such as the Miramichi, at Price's Bend and from thence to its source, as described in the case, exists by law in the Provincial Government of New Brunswick or its grantees; that any lease granted by the Minister of Marine and Fisheries, to fish in such fresh water non-tidal rivers, which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal; that where the exclusive right to fish has been acquired as incident to a grant of the land through which such river flows, their is no authority given by the Canadian Act to grant a right to fish, and the Dominion Parliament has no right to give such authority; and also that the ungranted lands in the Province of New Brunswick, being in the Crown for the benefit of the people of New Brunswick, the exclusive

(1) 2 Pug. & B. 580, 598.

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right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the Province, exclusively, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through Provincial property or private lands is illegal, and consequently the lease or license issued to the suppliant is null and void.

STRONG, J. :—

The fishery license granted to the respondent contains no covenant for title or warranty on the part of the Crown, and, therefore, upon no principle of law which has been suggested, or that I can discover, could the Crown be made liable to indemnify the respondent in the case of eviction. In my opinion the appeal ought to be decided upon this ground, for I do not think the court ought to entertain the special case, upon the submission of the Attorney-General, for the Crown to indemnify the respondent, if the court should be of opinion against the Crown on what, so far as the interest of the respondent is concerned, is a purely speculative question stated for the opinion of the court. In the case of private suitors, if a special case appears to be framed for the purpose of eliciting an opinion upon a question, the decision of which is not essential to determine the rights of the parties, the court will refuse to entertain it (1), and I see no reason why the same rule should not be applied to a case in which the Crown is a party. As the case is presented to the court, it appears that the officers of the Crown have arranged to pay the suppliant, not damages, but a gratuity, in the event of the court being of the opinion that the Crown had no authority to grant the license in question. This is to invoke an advisory, not a contentious jurisdiction, and such a jurisdiction ought not to be

(1) Doe v. Puntze, 6 C. B. 100.

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exercised unless conferred by statute, which has not been done.

As, however, the other members of the court take a different view on this point, I yield to their judgment, and proceed to express the opinion at which I have arrived on the points which have been argued.

Thus dealing with the case, I think the appeal should be dismissed; but although I arrive at this conclusion, I am not prepared to coincide in all the reasons stated in the judgment delivered in the court below.

I have no difficulty in agreeing in the judgment of Mr. Justice Gwynne, so far as it determines that by the true construction of the exception contained in the letters patent of the 5th November, 1835, by which the Crown granted the lands bordering on the river Miramichi, including the limits to which the respondent's license extended, that exception did not comprise the whole bed of the river Miramichi, but only so much of it as adjoined lands which the Crown had previously granted, and which lands are also excepted from the operation of the grant.

The exception in question is thus expressed:—"And also further excepting the bed and waters of the Miramichi river, and the beds and waters of all the rivers and streams which empty themselves into the St. John or the river Nashwaak, so far up the said rivers and streams respectively as the same respectively pass through or over any of the said heretofore previously granted pieces or parcels of land hereinbefore excepted."

I cannot conceive what language could have been adopted more plainly expressing an intention to except the portions of the bed adjacent to lands already granted, and such portions only. The object of the Crown clearly was to protect the rights of its earlier grantees, an object which would be equally applicable to grantees of lands lying on the Miramichi as to those of lands on the other

rivers named. Therefore, whilst, on the one hand, neither the words of the instrument itself nor the plain reason of thus restricting its operation, call for the construction contended for by the Crown, that the whole bed of the Miramichi was reserved; on the other hand, there is nothing to give the slightest colour to the argument said to have been advanced in the court below on behalf of the respondent, that the exception itself did not apply to the Miramichi, but only to the other rivers. Indeed, before this court, neither of the learned counsel who argued the case for the Crown and the respondent urged these contentions.

Then, it does not appear, from the statements of the case, that any portion of the bed of the river comprised in the fishery limits granted by the license, viz., from Price's Bend to its source, had been granted at a date earlier than that of the letters patent to the Nova Scotia and New Brunswick Land Company. The question next arises what, upon this construction and the state of facts just mentioned, was the effect of the grant upon the property in the bed of the river—did it pass under the grant to the land company, or was it reserved to the Crown?

The river Miramichi, between the two points indicated, Price's Bend and the source, is, upon the facts admitted in the case, beyond all question not a navigable or public river.

The navigable capacity of this portion of the river is thus described in the case:—"That portion of the Miramichi river which is covered by fishery lease to suppliant is above tidal waters, and is navigable for canoes and boats, and has been used from the earliest settlement of the country as a highway for the same, and for the purpose of floating down timber and logs to market. After the St. John, the largest river in New Brunswick is

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the Miramichi, flowing northward into an extensive bay of its own name. It is 225 miles in length, and seven miles wide at its mouth. It is navigable for large vessels 25 miles from the gulf, and for schooners 25 miles further to the head of the tide, above which, for 60 miles, it is navigable for tow boats. The river has many large tributaries, extending over a great extent of country. Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream, for the greater part, from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually floated down the river in high water, in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing, say June, July and August, canoes have to be hauled over the very shallow bars by hand."

This description is that of a river non-navigable, and consequently what is called a private river as regards that portion of it above Price's Bend. Whilst I do not hesitate to say that the rule which appears to have been adopted as a principle of the common law as administered in England that no rivers are to be considered in law as public and navigable above the ebb and flow of the tide, is not applicable to the great rivers of this continent, as has been determined by the Supreme Court of the United States and by the courts of most of the States; and whilst I think that with us the sole test of the navigable and public character of such streams is their capacity for such uses, I am still not prepared to accede to the argument of Mr. *Lash* that a river navigable in any part of its course is to be considered in law as navigable from its source. No authority can be produced for such a proposition, and the books are full of instances in which rivers navigable and public in their lower course have been held to be private and non-navigable in the

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upper part of the stream. In the case of *Murphy* v. *Ryan* (1) we have indeed an instance in which this was expressly determined to be the case. Then, the admitted statement contained in the case shows beyond all ground of cavil that in point of fact the portion of the river Miramichi in question is not in fact navigable, for, to say that a stream in which the most lightly constructed vessels used upon our waters require to be hauled over shallows and bars is a navigable river, would be a contradiction in terms and calls for no observation.

Then, no principle of law can be better established, both in England and America, than the rule which ascribes the ownership of the soil and bed of a non-navigable river *prima facie* to riparian proprietors of the opposite banks, each to the middle thread of the stream. To cite authorities for this universally recognised principle would be a useless waste of time. It is true that this is but a *prima facie* presumption, but this being so, in the present case there is not only nothing to rebut the presumption, but, on the contrary, it is greatly strengthened and made almost conclusive by the exception before adverted to, contained in the letters patent, reserving the soil or bed appurtenant to the lands of riparian owners holding under former grants from the Crown.

It results from the proprietorship of the riparian owner of the soil in the bed of the river that he has the exclusive right of fishing in so much of the bed of the river as belongs to him, and this is not a riparian right in the nature of an easement, but is strictly a right of property. To sustain these propositions of law, authorities without number might be cited; it is sufficient for the present purpose to refer to two or three of the most weighty and apposite. Sir Matthew Hale says in the

(1) Ir. R. 2 C. L. 143.

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treatise *De Jure Maris* :—"Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the propriety of the soil, and consequently the right of fishing *usque filum aquæ;* and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees common experience."

Chancellor Kent, in his Commentaries (1) states the law as follows:—"But grants of land bounded on rivers or upon the margins of the same, or along the same above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway."

I may say in passing that, although Chancellor Kent undoubtedly states the law as determined both by the older and more recent authorities applicable to private rivers such as the present, it may be doubted whether his doctrine is equally applicable to large navigable fresh water rivers, above the flow of the tide, not only where such rivers form international boundaries, as in the instance of the St. Lawrence, but in cases where their whole course is comprised within the same State or Province. Recent decisions in the learned Chancellor's own State (New York) seem to indicate that the beds of such large navigable rivers are, by the common law, vested in the State as a trustee for the public, and are

(1) Vol. 3, p. 427, ed. 12.

inalienable without legislative authority, and do not therefore pass *ad medium filum aquæ* to the riparian owners, and that the right of fishing in such rivers is public, as in the sea and the other large inland lakes of this continent. It is unnecessary for the purpose of the present case to decide this question, and I have only alluded to it to prevent any misapprehension hereafter, should the point itself arise for decision. It is sufficient for the present purpose that the passage from the Commentaries applies to non-navigable rivers, and gives us the law governing such streams as those we are now dealing with. To the authorities on this head already quoted, may be added that of Lord O'Hagan, lately Lord Chancellor of Ireland, who, when a Judge of the Irish Court of Common Pleas, in giving judgment in the case of *Murphy* v. *Ryan*, already referred to, thus distinctly affirms the doctrine of Sir Matthew Hale. He says:—"According to the well-established principles of the common law, the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moietively, to a supposed line in the middle, constituting their legal boundary; and being so possessed, have an exclusive right to the fishery in the water which flows above their respective territories."

From a treatise on the Law of Waters, lately published by Messrs. Coulson & Forbes, I extract the following passage:—"In all rivers and streams above the flow and re-flow of the tide, whether such rivers are navigable or not, the proprietors of the land abutting on the stream are *prima facie* owners of the soil of the alveus or channel *ad medium filum aquæ*, and as such have *prima facie* the right of fishing in front of their land.

"This right is a right of property, one of the profits of the land, and has been called a *territorial fishery*. It is not, strictly speaking, a riparian right arising from the

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right of access to the water, but is a profit of the land over which the water flows, and as such may be transferred or appropriated, either with or without the property in the bed or banks, to another person, whether he has land or not on the borders of, or adjacent to, the stream" (1).

Applying the law as thus stated to the facts stated in the special case submitted for the opinion of the Court, we must determine that at the time of the passing of the B. N. A. Act, the soil or bed of the river Miramichi, between Price's Bend and its source, was vested in the New Brunswick and Nova Scotia Land Company, or its grantees, to whom consequently also belonged—and that as a right of property, and not as an easement or franchise—the absolute and exclusive right of fishing within the same limits.

The question next presents itself, did the B. N. A. Act either directly affect these vested rights of property, or did it authorize Parliament to interfere with them by legislation? There is no pretence for saying that the Act contains anything in the slightest degree derogating from the rights of fishing belonging to the proprietors of the beds of non-navigable rivers. By the 13th enumeration of the 92nd section, the exclusive right to legislate concerning property is conferred upon the Local Legislatures, to whom also by the 16th sub-section are granted similar powers concerning matters of a local and private nature. These provisions must necessarily exclude the right of the Parliament of the Dominion to legislate to the prejudice of the rights of fishing vested in the proprietors of beds of rivers and streams, unless we can find in section 91, defining the powers of Parliament, some exception to the general effect of the word

1) See also *Marshall* v. *Ulleswater Co.*, 3 B. & S. 732; *Bristow* v. *Cormican* 3 App. Cas. 641.

"property" as including such a proprietary right. The only words in the last mentioned section which it can be suggested may have such an operation are those of the 12th enumeration, "Sea Coast and inland fisheries." It is a sound and well-recognised maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership, unless compelled to do so by express words or necessary implication. This principle has within the last few months been applied with much approval by the Privy Council, in the case of *The Western Counties Railway Company* v. *The Windsor and Annapolis Railway Company* (1), and is too well fixed as a canon of construction to be open to the least doubt or question. As observed in the judgment of the Privy Council in the case just mentioned, the only difficulty which ever arises respecting it is in its application to particular enactments. I think there is room for applying an analogous principle in the present case. Although the provision in question does not in itself make any disposition of the fisheries mentioned, but is merely facultative, empowering Parliament to make laws respecting the subjects named, we are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon Parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another Legislature. I am of opinion, therefore, that the thirteenth enumeration of section 91, by the single expression "Inland Fisheries," conferred upon Parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of

(1) 7 App. Cas. 178; *ante*, vol. 1, p. 351.

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the word "property," can only be interfered with by the Provincial Legislatures in exercise of the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may be well considered as authorizing Parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding, prohibiting obstructions in ascending rivers from the sea, preventing the undue destruction of fish by taking them in a particular manner or with forbidden engines, and in many other ways providing for what may be called the police of the fisheries. Again, under this provision Parliament may enact laws for regulating and restricting the right of fishing in the waters belonging to the Dominion, such as public harbours, the beds of which have been lately determined by this Court to be vested in the Crown in right of the Dominion, and also for regulating the public inland fisheries of the Dominion, such as those of the great lakes and possibly also those of navigable non-tidal rivers. There is therefore no unreasonable restriction of the power of Parliament in constructing the twelfth sub-section as I do, as not including a power to legislate concerning the right of property in private fisheries.

I am so far of accord with the learned judge whose judgment is the subject of appeal. I am compelled, however, to differ from him when he makes a difference between the rights of private owners which had been acquired by grant from the Crown before Confederation, and the rights of the Provincial Governments in respect of fisheries in non-navigable rivers, the beds of which, not having been granted, were vested in the Provinces at that date. I can see no reason for such a distinction.

By the B. N. A. Act, the Crown Lands are vested in the respective Provinces. This of course includes the beds of all non-navigable rivers and the consequent right to the fish in such waters, for there can be no doubt that the right of taking fish in rivers of this class, so long as they remain ungranted, is vested in the Provinces as an incident of the ownership of the public domain, just as the timber and all the other profits of the land are so vested. These fisheries, although often in practice not conserved by the Provinces, are certainly not public fisheries open of common right to all who may choose to avail themselves of them, as is the case with regard to the fisheries in tidal waters and the great lakes; but the Provincial Governments may, without special legislation, and in exercise of their right of property, restrict their use in any manner which may seem expedient just as freely as private owners might do. In short, the public have no more right in law to take fish in non-navigable rivers belonging to the Provinces than they have to fell and carry away trees growing on the public lands; in the one instance, as in the other, such interferences with Provincial rights of property are neither more nor less than illegal acts of trespass.

This being so, it seems very clear to me that no well-founded distinction, as regards the power of legislation by Parliament, can be made between fisheries in rivers which, at the date of Confederation, were the property of private owners under grants from the Crown, and those which remain the property of the Provinces as part of the public domain. In both cases the right of fishing is a profit of the land, an incident of the proprietary right in the soil, and is as much property in the hands of the Province as in that of a private owner. Then, if the B. N. A. Act contains nothing warranting federal legislative interference with this right of property in the

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case of a private owner, how can it be asserted that it does so when the ownership is vested in the Province? The Crown lands are expressly assured to the Provinces, and these include the beds of all such streams as that now in question. Where it was intended to make an exception to the general terms of the 109th section of the Act, as in the case of property reserved to Canada by the 108th section, and the power to assume lands or public property for the purposes of defence, conferred by the 117th section, we find such exceptions expressed in clear and distinct enactments. How, then, can it be presumed, in view not only of the 109th section, but also of the 5th enumeration of section 92, giving the Provinces exclusive legislative powers respecting the public lands, and that as to property generally in sub-section 13 of section 92, that the Dominion has the power to legislate respecting these fisheries incidental to the ownership of the Provincial lands, or respecting any other dismemberment of the right of property in such lands, if it is not conferred by the clause in section 91 respecting sea coast and inland fisheries? Not a single provision of the B. N. A. Act can be pointed to as conferring such powers of legislation, except that just mentioned, which, for the reasons already given in considering the case of private owners, must be held inapplicable.

I therefore come to a different conclusion in this respect from that arrived at in the judgment of the Exchequer Court.

There are, of course, fisheries of a very different character from these in non-navigable waters to be found within the limits of all the Provinces—public fisheries, such as those in tidal rivers and in the great lakes of the western provinces. A question may arise whether the provisions contained in section 91 authorize Parliament to empower the Crown to grant exclusive rights in

respect of such fisheries. Upon this point it would not be proper now to express any opinion, since none has been raised for adjudication. The same may also be said of an important question which may hereafter be presented for decision as to the right to legislate so as to authorize exclusive rights in respect of fisheries in what have been called by Chancellor Kent the "great rivers," meaning large navigable non-tidal rivers, a question the solution of which must depend on whether the beds of such rivers are vested in the Crown in right of the Dominion, not as part of its domain, but as trustees for the public; or in the owners of the adjacent lands, inasmuch as the right of fishing would in the first case be in the public as of common right, but in the second vested in the riparian proprietors.

These are questions the discussion of which would not be appropriate in the present case, and I refer to them only to point out that what I have said as to rivers of the class to which the portion of the Miramichi now in question belongs, has no reference either to navigable fresh-water rivers or to the great lakes.

I consider that I shall sufficiently answer the different questions propounded for the decision of this Court by stating my opinion that the Crown had no power to grant the license in question, and that the same is absolutely void; and further, that the Crown has no power, under the statute of 1868, to grant an exclusive right of fishing in any non-navigable river, whether the bed or soil of such river be vested in the Crown in right of the Province, or in a private owner deriving title under a grant from the Crown made either before or since the passing of the B. N. A. Act.

[*Translated.*]

FOURNIER, J.:—

After the learned discussions which we have just heard on the important question submitted to the consideration

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of this Court, it would be useless for me to go over again the facts of the case, and to discuss afresh at length the questions of right which it presents. But as the question of jurisdiction, between the local power and the Federal power raises here again for determination the question how far the Federal power, exercising its legislative power over a subject within its competence, can affect the rights specially reserved to the Provinces, and more especially civil rights, I think it right to repeat the expression of my opinion on this subject. Basing my opinion on that of the highest judicial authorities of the United States who have been called on to decide analogous questions as to the jurisdiction and the respective rights of the States and of the Federal Government of the American Union, I have adopted from the outset their opinion, that it was not possible to establish a uniform rule of interpretation which would serve for the decision of all conflicting questions of this kind. This opinion has been also expressed several times by Her Majesty's Privy Council: *Cushing* v. *Dupuy* (1), *Parsons* v. *The Citizens' Ins. Co.* (2), decided in November last.

In a late case, I had occasion to say, and I repeat it, "that the Federal Government has, without doubt, the power of touching incidentally on matters which come under the jurisdiction of the Provinces." But, in my opinion, this power does not extend beyond what is reasonable and necessary to legislation having solely as its object the legitimate exercise of a power conferred on the Federal Government This rule cannot any more than any other be of general application. However, applied to the present question, it is, I believe, easy to reconcile the respective interests of the two Governments. Section 91, sub-sec. 12 of the B. N. A. Act, in giving to the Federal Government the power of legislating as to

(1) 5 App. Cas. 415; *ante*, vol. 1, p. 252. (2) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

the fisheries, does not assign to it the right of property in them. It does not take them from the owners or existing possessors in order itself to appropriate them. Neither is it thus that this section has been interpreted by the Act 31 Vict. c. 60, passed a very short time after the Confederation Act. The second section declares expressly that the "Minister of Marine and Fisheries may, where the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing, wheresoever situated or carried on." As we see, the rights of all those who had any interest or ownership in the fisheries are respected. With regard to the right of property neither the Federal Act or the Fisheries Act have made any change in the state of things existing before Confederation. The ownership remains where it was before. There is not then in this respect any encroachment on the side of the Federal power. If the action of the Department of Marine has not been consonant with this principle, as in the present case, such action is void. While thoroughly respecting the right of fishing as property, could not the Federal Government exercise, in the general interest of the Dominion, a right of oversight and of protection? I think it could, and that this is precisely the object of the powers of legislation which have been granted to it on this subject. There is not, in my opinion, any incompatability between the exercise of this power and the exercise of the right of fishing as a right of property in other hands than those of the Government. The Federal Government can, in my opinion, say to the proprietor: "You shall not fish except at certain seasons and with certain authorized instruments or engines of fishing." This restriction is not an injury, but rather a restriction attaching to this kind of property. It is what I will call a regulation of police and of control over a kind of

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property which it is important to develop and preserve for the general advantage. We know what would in a short time become of the fisheries if individuals were left free to work them as should seem good to them. In a few years their blind greed would have ruined these sources of wealth—and our fisheries, in place of remaining as rich and fruitful as formerly, would soon return to the perishing, if not ruined condition in which they were before becoming the object of a protective legislation. This power of regulation, of oversight and of protection has been, before Confederation, exercised by each Province in the public interest. It is the same power which the Federal Government now exercises. It has not the power of touching the right of property in the fisheries any more than the Provinces have done. Its power is limited to regulating the exercise of it.

At the particular spot to which the bond and license relate, of which the validity is attacked, the river Miramichi is not navigable ; it is only floatable, according to the admission of facts taken as proved in this cause. It is for this reason that I shall refrain from making any observation on several other important questions learnedly discussed in the judgment of the honourable Judge Gwynne, respecting the right of fishing in navigable waters. It is sufficient for me to state, for the purposes of this case, that I agree in opinion with the honourable Chief Justice that the right of fishing in non-navigable waters is an incident of riparian property—whether the proprietor be a Province or an individual—subject, however, to the right of the public to make use of these non-navigable rivers as ways of communication, so far as their nature admits. I am further of opinion, with the honourable Chief Justice, that the exercise of the right of fishing in these same rivers is subject

to the power of the Federal Government to regulate the fisheries.

HENRY, J.:—

After a full consideration of the issues before us, I think the appeal in this case should be dismissed. The B. N. A. Act of 1867 conveys to the Dominion no property in the sites of the sea coast or inland fisheries, as I construe it. In section 91, which defines the powers of the Dominion Parliament, we find included "Sea coast and inland fisheries." That provision in the enumeration of the *powers* enables the Parliament of the Dominion to legislate on the subject, as it does in respect to matters such as 'Shipping and navigation," "Ferries," "Bills of exchange and promissory notes," and many others, without passing any right of property in the several subject-matters. In fact, in my opinion the power under the Act is but to regulate the fisheries and to sustain and protect them, by grants of money and otherwise, as might be considered expedient.

Independently of the Imperial Statute, the Dominion Parliament has no power to legislate in respect of property or civil rights in the Province, and could not otherwise by enactment affect the tenure of or title to real property. By the common law the owner of the soil has the right of fishery in unnavigable streams and water-courses. That right, to be taken away, restrained, or transferred, must be by a Parliament having jurisdiction over the subject matter, and to possess and exercise the power to interfere with and control private property and interests there must have been an express grant of that power in the Imperial Act. I have searched in vain for such, or even anything that would suggest the conclusion that such was intended. I am therefore of the opinion that the leases granted by the several Ministers

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of Marine and Fisheries, so far as they cover private property or affect private rights, are wholly irregular and void.

The same principles are applicable where lands are under the control of and owned by the Local Governments in trust for the use of the people of the several Provinces.

I think, therefore, that by force of the agreement under which this case is prosecuted, the respondent is entitled to our judgment. As the learned Chief Justice had prepared a judgment which embraces my views upon the leading points in the case, I have not thought it necessary to put my judgment in writing.

TASCHEREAU, J :—

I am of opinion to dismiss this appeal on the ground that, as an exclusive right of fishing existed in the part of the Miramichi river in question, the Minister of Marine and Fisheries could not legally grant a license to fish for that portion of the said river.

Appeal dismissed with costs.

JUDGMENT OF GWYNNE, J., IN THE EXCHEQUER COURT.

[*Reported 6 Can. S. C. R. 52*].

GWYNNE, J. :—

This special case came before me in the month of February, but upon the argument appearing to be imperfect was withdrawn, and amended, and as so amended was argued in the month of May. After this argument there appeared to me to be still wanting information as to some facts which should be introduced by way of further amendment. These facts have been supplied during the vacation, and are now made part of the case.

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The question is as to the right to the salmon fishery in the Miramichi river, in the Province of New Brunswick, and as to the validity of an instrument purporting to be a lease or license, under the provisions of the Fisheries Act of 1868, issued by the Minister of Marine and Fisheries, bearing date 31st of October, 1873. The questions submitted by the special case which has been agreed upon are as follows :

"1st. Had the Parliament of Canada power to pass the 2nd section of the Act of 1868, entitled 'An Act for the Regulation of Fishing and the Protection of the Fisheries ? '

"2nd. Had the Minister of Marine and Fisheries the right to issue the fishery lease in question ?

"3rd. Was the bed of S. W. Miramichi river, within the limits of the grant to the Nova Scotia and New Brunswick Land Company, and above the grants mentioned and reserved therein, granted to the said Company ?

"4th. If so, did the exclusive right of fishing in said river thereby pass to the said Company ?

"5th. If the bed of the river did not pass, had the Company, as riparian proprietor, the right of fishing *ad filum aquæ ;* and if so, was that right exclusive ?

"6th. Have the grantees in grants of lots bounded by said river or by any part thereof, and excepted from the said Company's grant, any exclusive or other right of fishing in said river opposite to their respective grants ?

"7th. If an exclusive right of fishing in a portion of the Miramichi river passed to the said Company or to the grantees in the excepted grants or any of them, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the river ?

"8th. Where the lands above tidal water, through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river ?"

It is agreed by the case, that if, upon the final determination of it, it be held that the Government had no power to make the lease in question to the suppliant, an order shall be made referring it to the proper officer of the Court to take an account of the expenses actually and properly incurred in connection with certain suits in the Courts in New Brunswick and such other actual expenses as he may have been put to on account of the action of parties who intercepted the rights claimed by him under the lease ; and it was

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further agreed that the Government should pay to the suppliant such of those expenses as the Court may think him entitled to, in case the suppliant and the Government should differ upon the matter.

The clause of the Act referred to in the first of the above questions is the 2nd section of the Dominion Act 31st Vict. c. 60, and is as follows:—"The Minister of Marine and Fisheries may, where the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases, and licenses for fisheries and fishing, wheresoever situated or carried on; but leases or licenses for any term exceeding nine years shall be issued only under authority of an order of the Governor-in-Council."

The Act in which this section is contained was passed by the Dominion Parliament "for the regulation of fishing and the protection of fisheries," and it was passed under the authority of the B. N. A. Act, the 91st section of which places, among other matters, under the exclusive authority of the Parliament of Canada, "Sea Coast and Inland Fisheries."

To secure an uniformly consistent construction of this our constitutional charter it is necessary that some certain and sufficient canon of construction should be laid down and adopted, by which all Acts passed as well by the Parliament as by the Local Legislatures may be effectually tested upon a question arising as to their being or not being *intra vires* of the legislating body passing them. Such a canon appeared to me to be that formulated by me in *The City of Fredericton* v. *The Queen* (1), and it still appears to me to be a good and sufficient rule for the required purpose, namely—"All subjects of legislation of every description whatever are within the jurisdiction and control of the Dominion Parliament to legislate upon, except such as are placed by the B. N. A. Act under the exclusive control of the Local Legislatures, and nothing is placed under the exclusive control of the Legislatures unless it comes within some or one of the subjects specially enumerated in the 92nd section, and is at the same time outside of the several items enumerated in the 91st section, that is to say, does not involve any interference with any of those items." The effect of the closing paragraph of the 91st section, namely, "and any matter coming within any of the classes of subjects enumerated in the 91st section shall not be deemed to come within the class of matters of a local or private

(1) 3 Can. S. C. R. 505; *ante*, p. 27.

nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," in my opinion clearly is to exclude from the jurisdiction of the Local Legislatures the several subjects enumerated in the 92nd section, in so far as they relate to or affect any of the matters enumerated in the 91st section.

Now, among the items enumerated in section 92 there is nothing which could give to the Local Legislatures any jurisdiction whatever over sea coast and inland fisheries, unless it be the item "property and civil rights in the Province," but inasmuch as "Sea Coast and Inland Fisheries" are enumerated specially in the 91st section as placed under the exclusive control of Parliament, this enumeration carries with it exclusive jurisdiction over property and civil rights in every Province, in so far as whatever is comprehended under the term "Sea Coast and Inland Fisheries" is concerned, and the Local Legislatures have no jurisdiction whatever over this subject. The jurisdiction, therefore, which is given to the Local Legislatures over "property and civil rights in the Province" is not an absolute, but only a qualified jurisdiction, and must be held to be limited to the residuum of such jurisdiction not absorbed by the exclusive control given to the Dominion Parliament over every one of the subjects enumerated in the 91st section; while the jurisdiction of Parliament over every subject placed under *its* control is as absolute and supreme as the jurisdiction of the Imperial Parliament over the like subject in the United Kingdom would be; the design of the B. N. A. Act being to give to the Dominion of Canada a Constitution similar in principle to that of the United Kingdom. It is, of course, in every case necessary to form an accurate judgment upon what is the particular subject-matter in each case as to which the question arises, for the extent of the control of Parliament over the subject-matter may possibly be limited by the nature of the subject; for example, the first item enumerated in the 91st section, as placed under the exclusive control of the Parliament, is "the public debt and property," and by section 108 the Provincial Public Works and property are declared to be the property of Canada. The jurisdiction of Parliament over such property is in virtue of the subject-matter being the property of Canada; but if Parliament should so legislate as to dispose absolutely by sale of portions of this property from time to time, it may well be that the property so sold, when it should become the property of individuals, should be no longer subject to the control

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of the Dominion Parliament any more than any other property of an individual should be; but over most of the subjects enumerated in the 91st section, the right of the Dominion Parliament to legislate is wholly irrespective of there being any property in the several subjects *vested* in the Dominion of Canada, and over these subjects the right of legislation continues forever, no matter who may have "property or civil rights" therein. There is nothing strange in this provision; on the contrary, it is in perfect character with the whole scheme of the Act, that the jurisdiction of the Dominion Parliament should be supreme over all subjects which are of general public interest to the whole Dominion, in whomsoever the property in such subject may be vested.

It cannot be questioned that all the inhabitants of this Dominion, in whatever Province they may reside, have an interest in the regulation and protection of the fisheries, whether they be sea coast or inland, not only as affording a large supply of food for the inhabitants of the Dominion, but a very extensive traffic also between the several Provinces and with England as well as with foreign States, thus extending the trade and commerce, external and internal, of the Dominion; and this interest of the public in the fisheries is not the less because in our inland waters, consisting of rivers and lakes teeming with the finest fish, private persons may have property therein. Now, what is to be comprehended under the term "Fisheries," as used in the 12th item of the 91st section of the B. N. A. Act? In Abbott's Law Dictionary, the term is defined to be, "the right to take fish at a certain place or upon particular waters."

Chancellor Kent, in his Commentaries, defines common of Piscary to be "a liberty or right of fishing in the water covering the soil of another person, or in a river running through another man's land. It is not," he says, "an exclusive right, but one enjoyed in common with certain other persons." Lord Holt, in 2 Salk. 637, said that it was to be resembled to the case of other common.

In the *Mayor of Carlisle* v. *Graham* (1), "Common of Fishery" is distinguished from "Common Fishery," the former being defined to be a right enjoyed by several persons, but not the whole public, in a particular stream; and the latter, a right enjoyed by all the public as on the sea, or to the ebb and flow of the tide: "Free Fishery" is there defined to be a franchise in the hands of a sub-

(1) L. R. 4 Ex. 361.

ject existing by grant or prescription, distinguished from an ownership in the soil; and "Several Fishery" to be a private exclusive right of fishing in a navigable river or arm of the sea; but whether it must be accompanied with ownership in the soil, in that the authorities differ.

Mr. Hargrave, in his jurisconsult consultations on the distinction of fisheries, differs from Blackstone, who was of opinion that the ownership of the soil was essential to a several fishery. After quoting Lord Coke's argument, Mr. Hargrave says: "At the utmost, they only prove that a several Piscary is presumed to comprehend the soil until the contrary appears, which is perfectly consistent with Lord Coke's position that they may be in different persons, and this indeed appears to be the true doctrine on the subject;" and Chancellor Kent, in his Commentaries (1), says: "The more easy and intelligible arrangement of the subject would seem to be to divide the right of fishing into a right common to all, and a right vested exclusively in one or more persons." In fresh-water rivers, he says, "that is, above the ebb and flow of the tide, the owners of the soil on each side had the interest and the right of fishery, and it was an exclusive right extending to the centre of the stream opposite their respective lands, unless a special grant or prescription be shewn."

In *Lord Fitzwalters' Case* (2), Hale, C.J., ruled that "in case of a private river, the lord's having the soil is good evidence to prove that he hath the right of fishing; and it puts the proof upon them that claim *liberam Piscariam*,"—*i.e.*, a right of fishing distinct from ownership of the soil.

The right of fishing, then, in rivers above the ebb and flow of the tide, may exist as a right incident upon the ownership of the soil or bed of the river, or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person, and the right of fishing in the waters covering that bed may be wholly in another or others.

Now, that the B. N. A. Act did not contemplate placing the title or ownership of the beds of fresh-water rivers under the control of the Dominion Parliament, so as to enable that Parliament to affect the title to the beds of such rivers, sufficiently appears, I think, from the 109th section, by which "all *lands*, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia

(1) Vol. 3, p. 411.

(2) 1 Mod. 105.

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and New Brunswick at the Union," are declared to belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate; and this term "*lands*" in this section is sufficient to comprehend the beds of all rivers in those ungranted lands. We must, however, in order to give a consistent construction to the whole Act, read this 109th section in connection with and subject to the provisions of the 91st section, which places "all fisheries," both sea coast and inland, under the exclusive legislative control of the Dominion Parliament. Full effect can be given to the whole Act by construing it (and this appears to me to be its true construction) as placing the fisheries or right of fishing in all rivers running through ungranted lands in the several Provinces, as well as in all rivers running through lands then already granted, *as distinct and severed from the property in, or title to, the soil or beds of these rivers*, under the exclusive legislative control of the Dominion Parliament. So construing the term "Fisheries," the control of the Dominion Parliament may be, and is, exclusive and supreme without its having any jurisdiction to legislate so as to alter in any respect the *title* or *ownership* of the beds of the rivers in which the fisheries may exist. That title may be and is in the grantees of the Crown where the title has passed, or may pass hereafter, by grants to be made under the seal of the several Provinces in which the lands may lie, but the exclusive right to control the "fisheries," as a property or right of fishing distinct from ownership of the soil, is vested in the Dominion Parliament.

So construing the term it must be held to comprehend the right to control, in such manner as to Parliament in its discretion shall seem expedient, all deep sea fishing and the right to take all fish ordinarily caught either on the sea coast or in the great lakes, or in the rivers of the Dominion, and which are valuable for food within the Dominion, or for exportation for that purpose, or for any other purpose of trade and commerce, and must include as well the right to catch fish as the designation and control of the places where the fish may be caught and the times and manner of catching; it must also, as it appears to me, be construed to comprehend all such rights of fishing and other matters relating to the "fisheries," as *distinct from ownership of the bed of the streams*, and relating to the protection of the fish, as had been provided by legislation within any of the old Provinces, as the same were constituted before the passing of the B. N. A. Act. Now, many Acts have been passed by the Legislature of the old Province of New Brunswick for the regulation and

protection of the fisheries in that Province between the 33rd Geo. III. c. 9, and 26 Vict. c. 6, prohibiting, among other things, the use of drift nets, the erection of any hedge, weir, fishgarth, or other incumbrance, or the placing any seine or net across any river, cove or creek in the Province in such manner as to obstruct or injure the natural course of the fish in any river where they usually go—regulating the construction of mill dams—prohibiting also the fishing for salmon and other fish at certain periods of the year, and giving to the justices in General Sessions in each county power to establish such other rules and regulations as to them should seem fit for the better production and preservation of the fish within their respective counties, provided that such regulations should not be contrary to, and should not interfere with, the general regulations and restrictions contained in any Act of Assembly or private right. By chapter 101 of the Revised Statutes, the Governor-in-Council was authorized to appoint two wardens of fisheries in any county, who should watch over and protect the fisheries, enforce the provisions of that Act, the rules of the justices in Sessions, or of municipal authorities, and the regulations of the Governor-in-Council in relation to such fisheries.

Section 5 authorized the Governor-in-Council to grant leases or licenses of occupation, for a term not exceeding five years, for fishing stations on ungranted shores, beaches or islands, which should terminate when such stations should cease to be used for such purpose, and that such leases or licenses should be sold at public auction, but that the right in lands and privileges already granted should not be affected thereby. This provision as to leases or licenses would seem to apply only to fishing in tidal waters: but 26 Vict. c. 6, which was in fact an amendment and consolidation of all previous Acts from c. 101 of the Revised Statutes, enacted that the Governor-in-Council might grant leases or licenses for fishing purposes in rivers and streams above the tidal waters of such streams or rivers when the same belong to the Crown, or the lands are ungranted; that such leases or licenses should be sold by public auction after thirty days' notice in the *Royal Gazette*, the upset price being determined by the Governor-in-Council, but that the rights of parties in lands and privileges already granted should not be affected thereby, and that the rents and profits arising from such leases or licenses should be paid into the Provincial Treasury to a separate account to be kept, called "The Fishery Protection Account."

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In Nova Scotia also there were statutes of a somewhat similar character. Ch. 94 of Title 25, Rev. Stat. (2nd series), regulated the sea coast fisheries, and c. 95 the river fisheries. The first section of this latter Act empowered the Sessions from time to time to make orders for regulating the river fisheries, and subjected every person who should transgress such orders to a fine not exceeding £10 for each offence; and by section 6 it was enacted that the Sessions should annually appoint such and so many places on the rivers and streams as might be attended with the least inconvenience to the owners of the soil or the rivers or resorts for the purpose of taking fish, but that the same and the enactments in the Act contained should not extend to any species of fish from the sea, except salmon, bass, shad, alewives and gaspereaux.

The 10th section regulated the salmon fishing. So likewise in Canada an Act was passed, intituled "An Act respecting fisheries and fishing," Consolidated Statutes of Canada, 22 Vict. c. 62, containing many like provisions, the first section of which authorized the Governor-in-Council to grant special fishing leases and licenses on lands belonging to the Crown for any term not exceeding nine years, and to make all and every such regulations as might be found necessary or expedient for the better management and regulation of the fisheries of the Province. This Act was amended by the 29 Vict. c. 11, the 3rd section of which (and from which the 2nd section of 31 Vict. c. 60 would seem to be taken), purported to give the Commissioner of Crown Lands the authority which the latter Act and section purports to give to the Minister of Marine and Fisheries, and is as follows: "The Commissioner of Crown Lands may, where the exclusive right of fishing does not already exist by law in favour of private persons, issue fishing leases and licenses for fisheries and fishing wheresoever situated or carried on, and grant licenses of occupation for public lands in connection with fisheries; but leases or licenses for any term exceeding nine years shall be issued only under authority of an order of the Governor-General in Council."

At the time of the passing of the B. N. A. Act, the above recited Acts were in force in New Brunswick, Nova Scotia and Canada respectively, and by force of the 129th section continued so to be, after the passing of the Act, until the same should be repealed, abolished or altered by Parliament, and the effect was in fact the same as if the B. N. A. Act had, for the protection and preservation of the fisheries, in precise terms, repeated those enactments and

declared that the Dominion Executive should have full power to carry them into effect until the Parliament should repeal, abolish or alter those enactments or any of them, or make additional or other provisions in their stead. Unlimited power is thus vested in the Parliament, either to maintain the then existing provisions or such of them as it should think fit; or in its wisdom to repeal, abolish or alter those provisions, and to make such further and other, or the like provisions and enactments upon the subject, as to it should seem expedient. Now, the Act under consideration, viz., 31 Vict. c. 60, maintains the like scrupulous respect for *private* rights as the old Acts which it repealed had done; for, by the 2nd section, the power given to the Minister of Marine and Fisheries to issue fishery leases and licenses is confined expressly to those places "where the exclusive right of fishing does not already exist by law," following the provision of the Canada statute 29 Vict. c. 11, section 3.

In all matters placed under the control of Parliament, all private interests, whether Provincial or personal, must yield to the public interest and to the public will, in relation to the subject matter, as expressed in an Act of Parliament. Constituted as the Dominion Parliament is after the pattern of the Imperial Parliament, and consisting as it does of Her Majesty, a Senate and a House of Commons, as separate branches, the latter elected by the people as their representatives, the rights and interests of private persons, it must be presumed, will always be duly considered, and the principles of the British Constitution, which forbids that any man should be wantonly deprived of his property under pretence of the public benefit or without due compensation, be always respected.

It is, however, in Parliament, upon the occasion of the passing of any Act which may affect injuriously private rights, that those rights are to be asserted; for once an Act is passed by the Parliament in respect of any matter over which it has jurisdiction to legislate, it is not competent for this or any court to pronounce the Act to be invalid because it may affect injuriously private rights, any more than it would be competent for the courts in England, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament, and the terms of the Act be explicit, so long as it remains in force effect must be given to it in all courts of the Dominion, however private rights may be affected. There is no evil to be apprehended from giving, in our Constitution, full effect to this principle, which is inherent in the

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British Constitution; nor would the transfer of jurisdiction to the Local Legislature be any improvement, for experience does not warrant the belief that the interests of private persons in relation to any subject would be more respected, or the public interest be better protected, if such subject were placed under the control of the Local Legislatures instead of under that of Parliament.

The Imperial Parliament, having supreme control over the title to, or ownership of, the beds and soil of the inland waters of the Dominion, and also over the franchise or right of fishing therein as a distinct property, has, at the request of the old Provinces of Canada, Nova Scotia and New Brunswick, as the same were constituted before the passing of the B. N. A. Act, so dealt with those subjects as, while leaving the title to the beds and soil of all rivers and streams passing through or by the side of lands already granted in the grantees of such respective lands, to place the franchise or right to fish as a separate property distinct from the ownership of the soil under the sole, exclusive and supreme control of the Dominion Parliament. Construing then the term "Fisheries" as used in the B. N. A. Act, as this franchise or incorporeal hereditament apart from and irrespective of the title to the land covered with water in which the fisheries exist, it seems to me to be free from all doubt, that the jurisdiction of Parliament over all fisheries, whether sea coast or inland, and whether in lakes or rivers, is exclusive and supreme, notwithstanding that in the rivers and other waters wherein such fisheries exist, until Parliament should legislate upon the subject, private persons may be seised and possessed of the fishing in such waters, either as a right incident to ownership of the beds and soil covered by such waters, or otherwise; and that, therefore, the first question in the special case must be answered in the affirmative.

The special case raises no question as to the terms of the particular instrument which has been used, nor whether it gives to the party named therein, assuming the Minister signing it to have the right to give, an exclusive franchise or privilege of fishing in the waters named during the period named, or only a right in common with others to whom a like privilege might be given, as in *Bloomfield* v. *Johnston*(1); but for the reasons already stated it will be seen that while, by force of the statute, the form of the instrument

(1) Ir. R. 8 C. L. 68.

(although it is not issued under the Great Seal of the Dominion, under which alone such a franchise could, by the course of the common law, be granted) may be sufficient to pass the franchise as distinct from the ownership of the bed or soil of the river, it cannot operate as a demise or transfer of the legal estate in the bed of the river to the donee or grantee or licensee (which latter term seems to me to be the most appropriate) of the franchise. As to the residue of the question submitted in the special case, it will be convenient to review the nature, condition and title to the particular property in question, namely, the right of fishing in the Miramichi river prior to and at the time of the passing of the B. N. A. Act, and to consider what the law as affecting such property then was.

The special case states that the portion of the Miramichi river which is covered by the fishery lease to the suppliant is above tidal waters, and is navigable for canoes and boats, and has been used from the earliest settlement of the country as a highway for the same and for the purpose of floating down timber and logs to market. After the St. John, the largest river in New Brunswick is the Miramichi, flowing northward into an extensive bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels 25 miles from the Gulf, and for schooners 20 miles further to the head of the tide, above which for 60 miles it is navigable for tow boats. It has many large tributaries, spreading over a great extent of country. Price's Bend is about 40 or 50 miles above the ebb and flow of the tide. The stream for the greater part from this point upwards is navigable for canoes, small boats, flat-bottomed scows, logs and timber ; logs are usually driven down the river in high-water in the spring and fall. The stream is rapid ; during summer it is in some places on the bars very shallow. In the salmon-fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

On the 5th November, 1835, a grant issued to the Nova Scotia and New Brunswick Land Company of 580,000 acres, which included within its limits that portion of the Miramichi river which is in question, and the said grant contained with the usual granting clauses the following clause : "Excepting also out of the said tract of land described within the said bounds, all and every lot, piece or parcel of land which has been heretofore by us or our predecessors given or granted to any person or persons whatsoever, or to any body corporate, by any grant or conveyance under the Great Seal of the Province of New Brunswick, or the Great Seal of the

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Province of Nova Scotia, during the period when the said hereby granted tract of land was part and parcel of our said Province of Nova Scotia, together with all privileges, etc., and also further excepting the bed and waters of the Miramichi river and the beds and waters of all the rivers and streams which empty themselves into the St. John or the river Nashwaak, so far up the said rivers and streams respectively as the same respectively pass through or over any of the said heretofore previously granted pieces or parcels of land hereinbefore excepted."

The contention of Mr. *Lash* upon the part of the Crown, as representing the Dominion Government, is, that the admissions in the case establish the river Miramichi, at the *locus in quo*, to be a navigable river, and that as such the public at large had a common right of fishing therein, and that therefore there could be no exclusive right of fishing therein, even if the bed of the river had passed by the grant to the Nova Scotia and New Brunswick Land Company, a point which, however, he disputes, contending that the bed of the river Miramichi is wholly excepted from the grant; and if the river be, as he contends it is, a public river, he contends that *Magna Charta* prevents any exclusive right of fishing therein. That the St. Lawrence and other great rivers of Old Canada and the great lakes formed by them are public waters open to the public at large, who have the right not only of navigation but of fishing also therein, unless in places which are covered by special grants, is too well established now to admit of a doubt. If the principle upon which *Dixon* v. *Snetsinger* (1) was decided be the correct principle, that right is established upon a firm basis in all those waters, wholly irrespective of the common law principle that such right is by the common law of England confined to tidal waters; but the same reasoning as in *Dixon* v. *Snetsinger* was applied to the rivers of Old Canada will not apply to the rivers of New Brunswick, the right of fishing in which must be considered with reference to the common law of England. I find some difficulty in determining what is precisely meant by the expression in the special case, wherein it is admitted that the portion of the Miramichi river which is covered by the fishery lease to the suppliant "has been used from the earliest settlement of the country as a highway for the same, and for the purpose of floating down timber and logs to market"—for, by the plan which accompanies the grant to the Nova

(1) 23 U. C. C. P. 235.

Scotia and New Brunswick Land Company, it would seem that for some 20 or 30 miles up the Miramichi river, within the limits of the company's grant and above the highest prior grant of any land upon the river above Price's Bend, the country was a dense forest without any settlement whatever, and higher up than the company's grant there is not said to have been any settlement, nor is it said that there had been any licenses to cut timber granted by the Crown in any part of the tract upon the river above the remotest land which had been granted. I find it difficult therefore to understand, if this is what is meant to be admitted, how from the earliest settlement in New Brunswick that part of the river which runs through wild ungranted forest land in which there never had been any settlement whatever, nor, so far as appears by the case stated, any licenses granted to cut timber could have been used, as stated in the case, "as a highway, and for the purpose of floating down timber and logs to market." However, the case sufficiently establishes the character of the river, for it admits that the part in question is above Price's Bend, which is situate 40 or 50 miles above the ebb and flow of the tide, and that from this point upwards the river is navigable only for canoes, small boats, flat-bottomed scows, logs and timber, which latter are driven down the river in high water, in the spring and fall, and that in the months of June, July and August, which is the salmon-fishing season, the water is so low that canoes have to be carried over the bars, which are very shallow, and that consequently, during this period of the year, the river is not, at the part in question, navigable for flat-bottomed boats, logs or timber. *Lloyd* v. *Jones* (1) is an authority that there is no connection between a right of fishing and a right of passage on a fresh-water river—that is, above the ebb and flow of the tide—and that the existence of the latter right does not carry with it the former. Creswell, J., at page 84, puts the point thus: "What answer is it to the plaintiff's complaint that the defendant unlawfully fished in his stream, for the latter to say that he had a right of way over the *locus in quo*?" So from *Orr Ewing* v. *Colquhoun* (2) it appears that a right of navigation in the public with boats, barges, rafts, etc., on an inland river, involves no right of property in the river or its bed. The public have merely the right to use the river for passing to and fro upon it, in the same manner as they have a right of passage along a public road or footpath through a private estate; but

(1) 6 C. B. 81.

(2) 2 App. Cas. 839.

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the right of fishing in such a river by the riparian proprietors is a right of property vested in such proprietors in virtue of their being seised of the *alveus* of the stream, *ad medium filum aquæ*, which *prima facie* all proprietors of land adjoining an inland river are; but if the *prima facie* ownership is rebutted by shewing the *alveus* of the river to be in another, then the right of fishing in that river follows the proprietorship of the *alveus*, until it be shewn that a right to fish has been acquired either by grant or prescription by a person not seised of the *alveus*. "Riparian proprietors" is a term applied by the civilians to the owners of water-courses, and the us of the same significant and convenient term is now fully introduced into the common law: the soil of the bed itself, and consequently the water, may be, and most often is, divided between two opposite riparian owners—that is, the land on one side may be owned by one person and the land on the opposite side by another. When such is the case, each proprietor owns to the middle, or what is called the thread of the river. "There is but one difference between a stream running through a man's land, and one which runs by the side of it: in the former case he owns the whole, and in the latter but half" (1). And in sec. 61 of his work on Waters and Water-courses, Angell says: "It will be seen by reference to the first chapter that where a person owns the whole of the soil over which a water-course runs in its natural course, he alone is entitled to the use and profits of the water; and that where a person owns only the land upon one side of a water-course his interest in the soil and his right to the water extend to the middle of the stream Concomitant with this interest in the soil of the beds of water-courses is an exclusive right of fishery; so that the riparian proprietor, and he alone, is authorized to take fish from any part of the stream included within his territorial limits." And Hale, *De Jure Maris*, p. 5 of Hargrave's tracts, says: "Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the *propriety* (that is, the property) of the soil, and consequently the right of fishing *usque filum aquæ*; and the owners of the other side the right of soil or ownership and *fishing* unto the *filum aquæ* on their side. And if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length." When we speak, then, of the

(1) Angell on Water-courses, sec. 10.

riparian proprietor or proprietors having the exclusive right of fishing in the river passing through or by the side of his or their lands, what is meant by the term "riparian proprietor" is the owner of the whole bed of the stream as well as of the land through which the stream passes, *or* the owners of the land on either side and of the bed of the stream, each on his own side, *ad medium filum aquæ*, which every owner of land upon either side of a stream is presumed to be until the contrary is shewn.

Chancellor Kent, in his Commentaries (1), says: "It was a settled principle of the common law that the owners of lands on the banks of fresh water-rivers, above the ebbing and flowing of the tide, had the exclusive right of fishing, as well as the right of property opposite their respective lands, *ad filum medium aquæ*; and where the lands on each side of the river belonged to the same person, he had the same exclusive right of fishery in the whole river, so far as his lands extended along the same. The right exists in rivers of that description, though they may be of the first magnitude, and navigable for rafts and boats, but they are subjected to the *jus publicum* as a common highway or easement, for many navigable purposes. . . . On the other hand it was held that in rivers not navigable (and, in the common law sense of the term, those only were deemed navigable in which the tide ebbed and flowed), the owners of the soil on each side had the interest and the right of fishery; and it was an exclusive right and extended to the centre of the stream opposite their respective lands . . . .

"This private right of fishery is confined to fresh-water rivers (that is, to rivers above the ebb and flow of the tide) unless a special grant or prescription be shewn; and the right of fishing in the sea, and in the bays and arms of the sea, and in navigable or tide waters, under the free and masculine genius of the English common law is a right public and common to every person; and if any individual will appropriate an exclusive privilege in navigable waters and arms of the sea, he must shew it strictly by grant or prescription."

In *Murphy* v. *Ryan* (2), it was held that the public cannot acquire, by immemorial usage, any right of fishing in a river in which, though it be navigable in fact, the tide does not ebb and flow, and that the term "Navigable," used in a legal sense, as applied to a river in which the soil *prima facie* belongs to the Crown and the

(1) 8th ed., vol. 3. p. 411. (2) Ir. R. 2 C. L. 143.

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fishing to the public, imports that the river is one in which the tide ebbs and flows.

This case is one of great authority, not only for the learning of the learned judges who decided it, but because it is cited with approbation by the Court of Exchequer in England, in *The Mayor of Carlisle* v. *Graham* (1). In pronouncing the judgment of the Court, O'Hagan, J., afterwards and now again Lord Chancellor of Ireland, says: "According to the well-established principles of the common law, the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moietively to a supposed line in the middle, constituting their legal boundary; and being so possessed, have an exclusive right to the fishery in the water which flows above their respective territories, though the law secures to the community the right of navigation upon the surface of that water, as a public highway which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river or dealing with the water to the injury of their neighbours. . . . . .

"But whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian owners is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and to belong to all the subjects of the Crown—the soil of the sea, and its arms and estuaries, and tidal waters being vested in the Sovereign as a trustee for the public."

He proceeds then to demonstrate by reference to authorities that a navigable river, in the sense of the public having a common right to fish in it, must be a tidal river, and that the right to fish therein "*publici juris*," is confined to the ebb and flow of the tide. "There are," he says, (2) "two kinds of rivers, navigable and not navigable. Every navigable river, so high as the sea ebbs and flows in it, is a royal river, and the fishing of it is a royal fishery, and belongs to the King by his prerogative; but *in every other river* not navigable, and in the fishery of such river, the ter-tenants on each side have an interest of common right." Quoting then Hale (3), he says: "Upon a full consideration of all the cases, it will, I think, appear that no river has been ever held navigable, so as to vest in the

(1) L. R. 4 Ex. 361.

(2) [This passage is cited by O'Hagan, J., from "the report of the case of the Royal Fishery of the Bann, by Sir J. Davis (Rep. 152)."]

(3) De Jure Maris, p. 11

Crown its bed and soil and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation ; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *prima facie* in the riparian owners, and the right of fishing *private.*" And so he concludes that the public can maintain no claim of right to fish in a river the soil of which is not *publici juris*, but private property.

In *Bloomfield* v. *Johnston* (1), where the Crown had granted lands adjoining to Lough Erne and islands in the lake it was held that although the lake was a public navigable highway, yet that being above the flux and reflux of the tide, and although it was held that the ordinary presumption that the bed and soil of a stream opposite their lands belong to the riparian proprietors, did not extend to a large lake like Lough Erne, the public had not any right of fishing therein of common right.

In *Bristow* v. *Cormican* (2), it was held by the House of Lords that *de jure* the Crown had not *prima facie* a right to the soil or fisheries in a lake like Lough Neagh, and that therefore the plaintiff, who claimed a right of fishing in the lake under a grant from Charles II., had to prove that the King at the time of such grant had an estate to grant; that it was not to be presumed. Lord Cairns there says: "It (the lake) contains nearly 100,000 acres : but though it is so large, I am not aware of any rule which would, *prima facie*, connect the soil or fishings with the Crown, or *disconnect them from the private ownership either of riparian proprietors or other persons* ; " and Lord Blackburn says : " It is clearly and uniformly laid down in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of *common right* belong to the adjoining land; and there is no case or book of authority to shew that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake."

In *Malcomson* v. *O'Dea* (3), Willes, J., delivering to the House of Lords the opinion of the Judges, says : " The soil of 'navigable tidal rivers,' like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for *Magna Charta*, the Crown could, by its prerogative, exclude the public from such *prima facie* right, and grant the exclu-

(1) Ir. R. 8 C. L. 68. (2) 3 App. Cas. 641. (3) 10 H. L. p. 618.

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sive right of fishery to a private individual, either together w th or distinct from the soil."

Rolle v. *Whyte* (1), and *Leconfeld* v. *Lonsdale* (2), decide that the provisions of *Magna Charta* and of the early statutes regulating fisheries, including 17 Ric. 2, c. 9, and 12 Ed. 4, c. 7, apply only to rivers navigable in the common law sense of the term, *i. e.* to the flux and reflux of the tide. *Rowe* v. *Titus* (3), and *Esson* v. *McMaster* (4), bear wholly upon a question as to the right of the public to the easement of passage along certain rivers in New Brunswick with boats, rafts and other property, and the rivers were held not to be navigable, but to be of common right public highways upon which the public had a right of passage, to which right the title of the owners of the soil and of the rivers was subservient. No reference is made in these cases to the right of fishing.

The great weight of authority in the United States of America accords with the decisions of the British Courts. In *Palmer* v. *Mulligan* (5), it was held in the Supreme Court of the State of New York, Kent being C. J., in 1805, that the river Hudson, at Stillwater, which is above the flux and reflux of the tide was not navigable in the common law sense of the term, citing the river *Bann Case* (6), *Carter* v. *Murcot* (7) and Hale, *De Jure Maris* from Hargrave (8).

Kent, C. J., says: "The Hudson at Stillwater is capable of being held and enjoyed as private property, but it is notwithstanding to be deemed a public highway for public uses, such as that of rafting lumber, to which purpose it has heretofore been and still is beneficially subservient."

In *Carson* v. *Blazer* (9), it was held in the State of Pennsylvania, in 1810, that the patent under which the proprietors of land abutting on the river Connecticut held under William Penn, did not pass to them the bed of the river above tide water, or any right of fishery therein, and that the river and the fisheries therein, above tide water, belonged to the State; the Court in this case held that the common law of England rule as to the flux and reflux of the tide determining the character of a navigable river did not apply to a river like the Connecticut. However, in *Adams* v. *Pease* (10), the

(1) L. R. 3 Q. B. 286.
(2) L. R. 5 C. P. 657.
(3) 1 Allen 326.
(4) 1 Kerr, 501.
(5) 3 Caines, 308, 319.
(6) Davis, 152.
(7) 4 Burr, 2162.
(8) Pp. 5, 8, 9.
(9) 2 Binney, 475.
(10) 2 Conn. 481.

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Supreme Court of the State of Connecticut, in 1818, held that the owners of land adjoining the Connecticut river, above the flow and ebb of the tide, have an exclusive right of fishing opposite to their land to the middle of the stream, but that the public have an easement in the river as a highway for passing and repassing with any kind of water craft. The Chief Justice, pronouncing the judgment of the Court says: "By the common law, in the sea, in navigable rivers and in navigable arms of the sea, the right of fishing is common to all. In rivers not navigable, the adjoining proprietors have the exclusive right. Rivers are considered to be navigable in the common law sense as far as the sea flows and reflows, and thus far the common right of fishing extends; above the ebbing and flowing of the tide the fishery belongs exclusively to the adjoining proprietors, and the public have a right or easement in such rivers as common highways for passing and repassing with vessels, boats or any water craft—a more perfect system of regulations on the subject could not be devised. It secures common rights so far as the public interest requires, and furnishes a proper line of demarcation between them and private rights."

In *The People* v. *Platt* (1), it was held by the Supreme Court of the State of New York, in 1818, that the right to take fish in the Saranac, a river falling into Lake Champlain, could not be a public right, for if the river had been granted, the right to take the fish was a private and individual right, and if it had not been granted, yet the right has not become public so as to authorize the entry of any one who might see fit to enter, for the right would belong to the State; and citing *Hale*, *Lord Fitzwalters' Case*, and *Carter* v. *Murcot* (2), [Spencer, C. J., delivering the judgment of] the Court says, "I cannot discover that these principles and distinctions have ever been denied or overruled; and I venture to say, that they are of indisputable authority." Referring to this case, the same Court, in 1822, in *Hooker* v. *Cummings* (3), says: "In the case of *The People* v. *Platt* . . . we recognised the principles of the common law to be that in the case of a private river (that is, where it is a fresh-water river in which the tide does not ebb and flow, and is not, therefore, an arm of the sea) he who owns the soil has *primâ facie* the right of fishing; and if the soil on both sides be owned by an individual he has the sole and exclusive right; but if there be different proprietors on each side they own on their respective sides

(1) 17 Johnson, 211. (2) 4 Burr. 2162. (3) 20 Johnson, 90, 100.

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ad medium filum aquæ. We considered, in the case referred to, that it was not inconsistent with this right that the river was liable and subject to the public servitude for the passage of boats; the private rights of the owners of the adjacent soil were no otherwise affected than by the river's being subject to public use. The same doctrine was advanced by Kent, Justice, in *Palmer* v. *Mulligan* (1), without any dissent by the other judges. The case of *Adams* v. *Pease* (2), has been published since the decision of the case of *The People* v. *Platt*, and there is an entire coincidence of opinion." And referring to *Carson* v. *Blazer* (3), Spencer C. J., delivering judgment, says: "I do not feel myself authorized to reject the principles of the English common law by saying they are not suited to our condition, when I can find no trace of any judicial decision to that effect, nor any legislative declaration or provision leading to such a conclusion," and he adopts the encomium passed upon the common law of England by the Chief Justice of the Supreme Court of the State of Connecticut in *Adams* v. *Pease*. The principles to be deduced from all these cases seem to be, that in the estimation of the common law all rivers are either navigable or not navigable, and rivers are only said to be navigable so far as the ebb and flow of the tide extends. Rivers may be navigable *in fact*, that is, capable of being navigated with ships, boats, rafts, etc., yet be classed among the rivers not navigable in the common law sense of the term, which is confined to the ebb and flow of the tide. Rivers which are navigable in this sense are also called public, because they are open to public use and enjoyment freely by the whole community, not only for the purposes of passage, but also for fishing, the Crown being restrained by *Magna Charta* from the exercise of the prerogative of granting a several fishery in that part of any river. Non-navigable rivers, in contrast with navigable or public, are also called private, because, although they may be navigable in fact, that is, capable of being traversed with ships, boats, rafts, etc., more or less, according to their size and depth, and so subject to a servitude to the public for purposes of passage, yet they are not open to the public for purposes of fishing, but may be owned by private persons, and in common presumption are owned by the proprietors of the adjacent land on either side, who, in right of ownership of the bed of the river, are exclusive owners of the fisheries therein opposite their respective lands on either side to the centre

(1) 3 Caines, 307. (2) 2 Conn. 481. (3) 2 Binney, 475.

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line of the river. *Magna Charta* does not affect the right of the Crown, nor restrain it in the exercise of its prerogative of granting the bed and soil of any river above the ebb and flow of the tide, or of granting exclusive or partial rights of fishing therein as distinct from any title in the bed or soil, and in fact Crown grants of land adjacent to rivers above the ebb and flow of the tide, notwithstanding that such rivers are of the first magnitude, are presumed to convey to the grantee of such lands the bed or soil of the river, and so to convey the exclusive right of fishing therein to the middle thread of the river opposite to the adjacent land so granted. This presumption may be rebutted, and if, by exception in the grant of the adjacent lands, the bed of the river be reserved, still such reservation does not give to the public any common right of fishing in the river; but the property and ownership of the river, its bed and fisheries, remain in the Crown, and the bed of the river may be granted by the Crown, and the grant thereof will carry the exclusive right of fishing therein; or the right of fishing, exclusive or partial, may be granted by the Crown to whomsoever it pleases, just as any private person seised of the bed of the river might dispose thereof. This right extends to all large inland lakes also, for although in their case the same presumption may not arise as does in the case of rivers, namely, that a grant of the adjacent lands conveys *prima facie* the bed of the river (as was decided in *Bloomfield* v. *Johnston*), still, the prerogative right of the Crown to grant the bed of rivers above the ebb and flow of the tide, not being affected by the restraints imposed by *Magna Charta*, cannot be questioned, for all title of the subject is derived from the Crown and so if a bed of a river, or the right of fishing therein, be reserved by the Crown from a grant of adjacent lands, the right and title so reserved remains in the Crown, in the same manner as it would have vested in the grantee if not reserved, and is not subject to any common right of fishing in the public; for, as was said by Lord Abinger, C. B., in *In re Hull and Selby Ry. Co.* (1), "But *Sir F. Pollock* says we all hold by grant from the Crown: then the Crown holds by the same rights and with the same limitations as its grantee." So in *Bloomfield* v. *Johnston*, above cited, it was held that a grant by the Crown of a free fishery in the waters of Lough Erne did not pass a several or exclusive right of fishery therein, but only a license to fish on the property of the grantor, and that the sev-

(1) 5 M. & W. 3

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eral fishery remained in the Crown subject to such grants or licenses to fish as it might grant. In Old Canada the right of the Crown to make such grants of the bed of the great lakes is recognised by Act of Parliament.

Although the exercise of the prerogative of the Crown to grant a several fishery in waters where the tide ebbs and flows is restrained by *Magna Charta*, still the right of Parliament in its wisdom (in the exercise of its paramount control in the interests of the public, and as the exponent of the voice of the nation as regards all property) to authorize such grants there, equally as in waters above the ebb and flow of the tide, is undoubted.

I speak here of the Parliament of the United Kingdom, and the like power, over all subjects placed by the B. N. A. Act under the control of the Parliament of Canada, is vested in that Parliament.

As regards, then, the particular river in question, at the place in question, above Price's Bend, notwithstanding that it may be true that it is subject to a servitude to the public for a common right of passage over its waters—as to which I express no opinion, inasmuch as the determination of that point is unnecessary in the case before me—but assuming the river to be subject to such servitude, still, the river there partakes not of a character of a navigable or public, but of a non-navigable or private river, in the sense in which these terms are used in law, and the public have no common right of fishing therein.

The *prima facie* presumption being that the owners of the adjacent lands are owners of the bed of the river, which presumption may be rebutted, it is necessary now to consider the point, which is urged upon behalf of the Crown as representing the Dominion Government in this case, namely, that the presumption is rebutted by matter appearing upon the grant to the Nova Scotia and New Brunswick Land Company, which is made part of the case and has been produced in evidence, for, if not rebutted, the exclusive right of fishing passed by that grant to the company, and the Act of Parliament 31 Vict. c. 60, does not affect, or in its 2nd section profess to deal with, any fisheries in which an exclusive right of fishing had been conveyed by the Crown and was vested in any persons at the time of the passing of the Act.

The clause in the letters patent conveying the land to the company which is relied upon in support of this contention is the latter part of the exception above extracted, namely: "And also

further excepting the bed and waters of the Miramichi river, and the beds and waters of all the rivers and streams which empty themselves either into the river St. John or the river Nashwaak, so far up the said rivers and streams respectively as the same respectively pass through, or over any of the said heretofore previously granted tracts, pieces or parcels of land hereinbefore excepted."

This exception, it is urged, is open to two constructions, the one that insisted upon by Mr. *Lash*, upon behalf of the Dominion Government, namely, that the bed of the Miramichi river is excepted absolutely throughout its whole length, and the beds of the other rivers and streams flowing into the river St. John and Nashwaak qualifiedly, that is to say, "so far up those rivers and streams respectively, etc.," and the other that insisted on by Mr. *Haliburton*, upon behalf of the suppliants, namely, that the qualification involved in the words "so far up the rivers and streams respectively, etc.," is to be attached to the exception as to the bed of the Miramichi river as well as to the beds of the other rivers and streams mentioned in the same sentence.

Which of these two constructions is the correct one depends upon the determination of the question—what should be held to have been the intention of the Crown in making the grant of the lands mentioned in the letters patent containing the exception? "It is always," (says Sir John Coleridge, delivering the judgment of the Privy Council in *Lord* v. *The Commissioners for the City of Sidney* (1), upon a question as to the construction of a Crown grant) "a question of intention to be collected from the language used with reference to the surrounding circumstances . . .

"Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found." And the same construction, I may add, is to be put upon words in a grant of land by the Crown which has been established by the decisions of the Courts to be the proper construction to be put upon the same words in a grant between subject and subject. Now, for the purpose of assisting in arriving at the intention of the Crown as to the use of the above words in the letters patent to the Nova Scotia and New Brunswick Land Company, as well as for the purposes of the 6th question in the special case, namely: "6thly,

(1) 12 Moo. P. C. C. 473, 497.

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have the grantees in grants of lots bounded by the said rivers or by any part thereof and excepted from the said company's grant any exclusive or other right of fishing in said river opposite their respective grants?" copies of sixteen letters patent have been produced, five of which grant lands situate upon the Miramichi, and nine lands situate upon the other rivers and streams mentioned in the letters patent to the Nova Scotia and New Brunswick Land Company running through the tract of land granted to that company, falling into the rivers St. John and Nashwaak, and it is admitted that all other grants to others within the lines, constituting the boundaries of the tract described in the letters patent to the company are in similar form to those of which the copies have been supplied. Copies also of two letters patent granting large tracts of land amounting to about 25,000 acres, immediately outside of and abutting upon the limits of tract described in the letters patent to the Nova Scotia and New Brunswick Land Company, have been produced.

From a perusal of these several letters patent, it appears that, as regards the title to the soil and beds of the said several rivers alike, the language of all the letters patent is the same, the practice of the Crown was uniform throughout. Now the established rule of law is that *prima facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, and that a description which extends "to the water's edge," or "to a river" or "to the river's bank," or which begins at a stake, tree or other monument "by the side of a river" or "in a river's bank," and which runs "up" or "down the river," or "its bank," or "by the side of the river," or "following its courses," or to a stake, tree or monument "by the side of the river," or "on the river's bank," or the like, carries the grant to the thread of the stream. In all such cases, the grant covers the bed of the stream, unless there be some expression in the terms of the grant, or something in the terms of the grant taken in connection with the situation and condition of the land granted, which clearly indicates an intention that the grant should stop at the edge or margin of the river, and should exclude the river from its operation. There must be a reservation or restriction, expressed or necessarily implied, to control the general presumption of law and to make the particular grant an exception from the general rule. This is the established doctrine, not only in England, but in the Courts of the United States of America also, as will sufficiently appear from the cases already cited and from

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Wright v. *Howard* (1), *Kains* v. *Turville* (2), *Tyler* v. *Wilkinson* (3), *Robinson* v. *White* (4), *Lowell* v. *Robinson* (5), *Child* v. *Starr* (6), *Luce* v. *Carley* (7), *Howard* v. *Ingersoll* (8), and Chancellor Kent's Comm. vol. 3. p. 427.

Tried according to the principle laid down in the above cases, it cannot admit of a doubt that the description of boundaries in every one of the letters patent which have been produced and above referred to include and convey to the several grantees of the land therein respectively described the soil and bed, not only of all the streams and rivers which flow into the rivers St. John and Nashwaak, but also of the river Miramichi, and in truth of the Nashwaak itself, where the rivers pass through or abut upon the lands described, and as it is part of the admissions in the case that all other grants of land situate within the outside limits of the tracts described in the letters patent of the 5th November, 1835, to the Nova Scotia and New Brunswick Land Company, are in like form with those above recited, it must be concluded as not admitting of a doubt, that every grant which had been made, prior to the 5th November, 1835, of land lying within the limits of the description of the tract described in the letters patent of that date, passed and conveyed to the several grantees of such lands without exception the bed and soil of the river Miramichi, as well as the bed and soil of all the rivers and streams flowing into the St. John and Nashwaak, in accordance with the general presumption and rule of law, when the lands granted abutted upon any of the said rivers.

This being established, it only remains to be considered whether the terms of the grant contained in the letters patent of the 5th November, 1835, are so explicit as to reverse the general presumption of law, and to indicate clearly the intention of the Crown to be to make the grant to the Nova Scotia and New Brunswick Land Company an exceptional grant and different in this particular from all prior grants made by the Crown in that locality, and which, within the limits mentioned in the letters patent of the 5th November, 1835, comprised 206,000 acres of the 795,000 acres constituting the gross contents of the tract, the outside limits of which are given in those letters patent.

We must reasonably conclude that the object of the grant to the

(1) 1 Sim. & St. 190.
(2) 32 U. C. Q. B. 17.
(3) 4 Mason, 400.
(4) 42 Me. 209.
(5) 4 Shepley, 357.
(6) 4 Hill, 369.
(7) 24 Wendell, 451.
(8) 13 Howard, 416.

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company was to use the company as an instrument for facilitating the settlement of the Province of New Brunswick, in like manner as in the case of a similar grant, which had been made some years previously in Canada, to the Canada Company. It was necessary to the full enjoyment of the grant and to insure success to the undertaking of the company by the settlement of the country, that the settlers should have the right and power to erect mills and to use the power of the rivers, by dams across them, for the purpose of driving the mills; this they could not do in those rivers or streams, if any there were, whose beds and soil were excepted from the grant to the company.

No possible reason has been suggested or can be assigned why the Crown should make the grant to this company an exception from all previous grants made in the same locality, and so obstruct what must have been the object of the grant, namely, the settlement of the Province; or why the river Miramichi should be made an exception from all the other rivers and streams; or why the river Miramichi itself, where in its course it abutted upon lands granted to the company, should be excluded from the grant, while the soil and bed of the same river, where it abutted upon land granted to other persons had been included in those grants and passed to the respective grantees of the adjoining lands;—or, in the language of the Judgment of the Privy Council in *Lord* v. *The Commissioners for the City of Sydney* (1), "why it (the Crown) should have reserved what might be directly and immediately useful to the grantees and could scarcely have been contemplated as of any probable use to the Crown, and this too in an infant colony where it was the manifest and avowed policy to encourage settlement and the cultivation of lands by grants on the easiest and most favourable terms."

We must then give to the letters patent of the 5th November, 1835, such a construction as shall be consistent with the previous uniform practice of the Crown and with the general presumption of law, and so as to make the grant valuable in view of the purpose which it must have had in view, and not so as to derogate from that value, unless the terms and expressions in the grant are so peremptory and clear as to place beyond doubt that the intention of the Crown was to exclude from the grant to the company the bed of the Miramichi river, where it abuts upon lands granted to the company. The only construction which, in accordance with the above princi-

(1) 12 Moo. P. C. C. 473.

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ples, can, in my judgment, be properly given to the letters patent of the 5th November, 1835, is, that the exception therein affects the Miramichi only in the same manner, and to the same extent, as it affects the other rivers and streams therein mentioned, namely, all those falling into the rivers St John and Nashwaak, and consequently that the exception is limited to the bed and soil of the Miramichi river, as it is to the bed and soil of the said other rivers and streams, namely, opposite to the lands which had previously been granted on the banks of the rivers.

The form of the description in the letters patent of the 5th November, which the draftsman has made to comprehend within the limit of the tract described, 106,000 acres, which had already been granted, much of which was situate upon the banks of the said several rivers, made it necessary to except from the grant to the company whatever had been previously granted, and the bed and soil of the rivers opposite the lands so granted. This affords a rational cause, and indeed the only apparent rational cause for the exception being inserted at all, and consequently the letters patent must be so construed as to limit the application of the exception to this rational purpose. It was suggested that if the bed and soil of the rivers opposite to the lands previously granted had passed to the grantees of such lands, the exception of those lands, which is also expressed in the letters patent of the 5th November, would have been sufficient to comprehend also the beds of the rivers; but, granting this to be so, it is plain that whether the beds of the rivers had or not passed by the previous grants of lands situate on their banks, the draftsman of the letters patent of the 5th November has, *ex majori cautela*, inserted an express exception of the beds of the rivers and streams flowing into the St John and Nashwaak, where such rivers and streams abutted on lands already granted. This is not disputed, but the contention is, that in the case of the Miramichi the exception is not to be construed as being so limited, but is absolute. But for this distinction no reason whatever is suggested, and I have shewn that in the previous grants the Miramichi river was precisely in the same position as all the other rivers, and that in the case of all alike the beds of rivers abutting on lands granted had been granted and had passed to the grantees of lands.

The letters patent are capable of the construction that the exception shall be limited in the case of the Miramichi, equally as in the case of the other rivers and streams, and as that construction is most consistent with the uniform practice of the Crown, and with

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what must have been the object of the company, in acquiring the lands granted, with the general presumption of law, and with reason and common sense, that is the construction which must be given to the letters patent. It follows that the Miramichi river, where the lands granted to the Nova Scotia and New Brunswick Land Company abut upon it, is excluded from the operation of the Fisheries Act, 31 Vict. c. 60, for there an exclusive right of fishing had passed to the company, their successors and assigns, by the letters patent of the 5th November, 1835.

It was urged, it is true, but scarcely I think seriously, that by force of the 108th sec. of the B. N. A. Act, and of the 5th item of the 3rd schedule annexed to the Act, namely : "Rivers and Lake improvements," the bed and soil of the Miramichi, as well as the beds and soil of every river in the Dominion, is declared to be "the property of Canada." The sole ground for this contention is that the word "Rivers" as printed in the schedule is plural, while the word "Lake" is singular, and that if it had been intended that the word "improvements" should be read in connection with the former as with the latter it would have been printed "River" in the singular as in the word "Lake." To this it was replied, that the absence of a comma after the word "Rivers" afforded as good an argument, that the word "improvements" was intended to be read in connection with the word "Rivers" as with "Lake," notwithstanding the affix of a final "S" to the former. I confess I think both arguments are of about equal weight, and I do not think it profitable to enquire whether the affix of the letter "S" or the omission of a comma is the act of the printer or of Parliament, for by sec. 108 of the Act, it is clear that the things which are by that section made the property of Canada are "the public works and property of each Province," enumerated in the 3rd schedule. Whether, therefore, the word be printed "River" or "Rivers" in the 3rd schedule the result is the same, and the word "improvements" must be read with it, to indicate the "public work" which having been the property of the Province in which it had been situate is made the property of Canada.

I have thus substantially answered all or most of the questions submitted in this special case, but it may be convenient briefly to give my answers thus :

The first, third, fourth, and sixth questions must be answered in the affirmative, and the second and seventh in the negative.

To the fifth it is unnecessary to give any special answer, as I am

of opinion that the bed of the river did pass to the company. However, it may be said, that if it had not so passed, the case offers no evidence of any exclusive right of fishing therein having passed to the company, which right in such case could only be by grant or prescription. I have in my judgment explained at length my views upon the rights of riparian proprietors, and of what is meant by that term.

To the eighth it may be answered that if what is meant by this question as framed is, whether the Minister of Marine and Fisheries could lawfully issue a lease of the bed of the river, where it passes through ungranted lands, I am of opinion that he could not, but that the Act does authorize him to issue, and therefore he could lawfully issue a license to fish, as a franchise apart from the ownership of the soil in that portion of the river.

The 109th sec. of the B. N. A. Act, already quoted, declares that "all *lands*, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate." Now, whether this section is to be regarded as sufficient to transfer the *legal estate* in those lands to the several Provinces as corporations, or as a declaration merely that they shall be held by the Crown in trust for, and as part of the public *demesne* of, the respective Provinces, matters not, as it appears to me, in so far as the question under consideration is concerned, for what is declared shall belong to the newly created Provinces is that which at the Union belong to the Provinces as formerly constituted, and those lands which had not yet been granted were already subject to a like provision in virtue of Acts of Parliament relating to the fisheries in existence before the Union, which Acts, the 129th sec. of the B.N.A. Act declares, shall continue in existence after the Union until repealed, abolished, or altered by Act of the Dominion Parliament. The effect then of the 109th sec. must be to make the lands part of the public domain of the respective Provinces, subject to the provisions of the several Acts in force relating to the fisheries at the time of the Union, and to such other or the like provisions as the Parliament of Canada should enact upon the subject of the fisheries, treating that term as relating to the incorporeal hereditament or *liberu piscaria* as already explained, which subject was placed under the exclusive control of the Parliament, and the expression in the 2nd sec. of the Dominion Act, 31 Vict. c. 60, namely, "where the exclusive right of fishing does not already exist by law" must, I

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think, be construed to include that part of the public domain in the respective Provinces consisting of ungranted lands, over which, not having been converted into private property, no exclusive right of fishing could be legally established by any person.

Over those ungranted lands the Dominion Parliament had, in my judgment, for the reasons already given above, the undoubted right to legislate in the manner provided by the 2nd sec. of the 31 Vict. c. 60, and that section does, I think, sufficiently cover those lands which, prior to the passing of 31 Vict. c. 60, were, as I have shewn, subject to a like provision, and the frame of the 2nd sec. of that Act, when compared with the corresponding sections in the Acts which were in force until repealed by 31 Vict. c. 60, leads to the conclusion that the same lands were referred to in the latter Act as in the like connection were referred to in the former, namely, ungranted public lands.

I have entered into the subject as fully as I could, in order that I might make my judgment upon all the points as clear as I am capable of doing, for the reason that in the event of an appeal I shall not sit upon the case in appeal. The Court of Exchequer being composed of the same judges as are the judges of the Supreme Court, an appeal from the judgment of a single judge of the Court of Exchequer to the Supreme Court is in substance and effect simply an appeal from one of the judges to the full Court. To avoid the possible anomaly of the full Court being divided, and the judgment nevertheless of one of the judges of the divided Court remaining of record as a judgment of the Court, it is a point worthy of Parliamentary consideration, whether it may not be expedient to enact that an appeal from a single judge of the Exchequer Court should be heard only by the other judges, so that in every case of appeal from the Exchequer Court, in order to sustain any judgment as the judgment of the Court, there should be a *majority* of all the judges constituting the Court in favour of it.

The constitution of the Court of Exchequer makes a marked difference between the case of an appeal from that Court, when the Appellate Court is divided, and the case of an appeal from an independent Court consisting of other judges than those constituting the appellate tribunal when the latter is divided.

The judgment of the Court therefore is that a rule shall issue in the terms of the provisions of the special case, referring it to the Registrar to take an account, as agreed upon by the concluding paragraph of the case.

SUPREME COURT OF CANADA.

ROBERT T. HOLMAN *et al*.....*Appellants;*

AND

CHARLES GREEN.....*Respondent.*

1881*
May 4.
1882
March 28.

On Appeal from the Supreme Court of Prince Edward Island.

[*Reported 6 Can. S. C. R. 707.*]

Public Harbour—B. N. A. Act, sec. 108—25 *Vict., c.* 19, *P. E. I.*

The "Public Harbours" which by the B. N. A. Act are declared to be the property of the Dominion include all harbours, together with the bed or soil thereof, which the public have the right to use, and are not limited to such a at the time of Confederation had been artificially constructed or improved at the public expense; and where a grant of part of the foreshore of a natural harbour used as such by the public, was made by the Provincial Government of Prince Edward Island subsequent to the admission of that Province into the Union, the grant was held to be invalid.

Appeal from a judgment of the Supreme Court of Prince Edward Island, making absolute a rule *nisi* for a nonsuit in an action of ejectment brought by the appellants (plaintiffs below) against the respondent (defendant below) to recover possession of a piece of land, being part of the foreshore between high and low water-mark of the town of Summerside, lying outside of and to the westward of the Queen's wharf.

The writ was issued on the thirty-first day of August, A.D. 1877. The defendant limited his defence to that part of the premises described in the writ, situate on

*Present:—RITCHIE, C. J., and STRONG, FOURNIER, HENRY and GWYNNE, JJ.

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the western side of the Queen's wharf. The cause was heard before the Chief Justice and a jury in October, 1878.

The appellants (plaintiffs below) claimed title to the *locus* under a grant to them from the Crown in fee, under the Great Seal of Prince Edward Island.

The local statute 25 Vict. c. 19, enabled the Lieutenant-Governor in Council to issue grants of certain parts of the seashore of Prince Edward Island.

The respondent offered no evidence of any title to the *locus*.

The jury found a verdict for the appellants (plaintiffs below) for all the lands in issue. The respondent afterwards, pursuant to leave reserved by the Chief Justice at the trial, obtained a rule *nisi* for a new trial or nonsuit on the following, among other grounds:—

"3. Because said grant is void on the ground that at the time it was made the plaintiffs were not in possession of the whole of the land in front of which the *locus* lies, part of the same being a public street, another part being in possession of I. L. Steeves, and another part in possession of Thomas Brehaut, tenants of the plaintiffs.

"4. Because said grant is void on the ground that the *locus* is in front of and abuts the railway, which is vested in the Dominion of Canada, and it was admitted that no consent from the Dominion Government had been obtained.

"5. Because said grant is void on the ground that the *locus* abuts on the public wharf under the control of the corporation of Summerside, and no consent was obtained from such corporation.

"8. Because said grant is void on the ground that by the B. N. A. Act all public harbours are vested in Canada, and Summerside is a public harbour."

This rule *nisi*, after argument, was made absolute for a nonsuit on the above 3rd, 4th and 5th grounds, and against this latter rule the appellants appealed to the Supreme Court of Canada.

The counsel were heard at length on the several grounds taken in the rule *nisi*, but as the judgment of the Supreme Court proceeded entirely on the ground that the grant was void because by the B. N. A. Act all public harbours are vested in Canada, and Summerside is a public harbour, their arguments on those points are omitted.

Mr. *Davies*, Q.C., for appellants:

The public harbours which became the property of the Dominion by the 108th section of the B. N. A. Act must be such public harbours (if any) as the Local Government as such had acquired an actual property in, *e.g.*, artificial harbours constructed by the outlay of moneys. This section contemplated public works of the Province only, and not natural harbours in which the Province had no special property. The words must be construed as *ejusdem generis* with the class of words in the clause where they are used. This is not an artificial harbour. The only moneys expended here were on the wharves by private individuals and by the Provincial Government.

Mr. *Peters*, for respondent:

The wharf in question was built out of the funds of the Government of Prince Edward Island, and has always been known as a Government wharf. Putting aside the question that Summerside is a public harbour, and is vested in the Government of Canada under sec. 108 B. N. A. Act, I contend the wharf in question is a public work and comes within the word "piers" mentioned in the third schedule of the Act. It is not an

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answer to say that a pier should be built of stone. It is built on public property and advances into the harbour. The Dominion Parliament alone has control over public works necessary to carry on trade.

I also contend that the whole soil of the harbour passed to the Dominion, and that the giving of grants is inconsistent with the rights of the Dominion Government in the harbour. See B. N. A. Act, 1867, sec. 108, schedule 3.

If it is necessary for the purposes of carrying on trade that the Dominion Government should have the property in artificial harbours, why should they not also have the control of natural harbours, and it cannot be denied that Summerside harbour is one of the natural harbours of the Island.

RITCHIE, C. J.:—

One of the points raised, on which I think the case must turn, was that the harbour of Summerside is a public harbour, and is vested in the Government of Canada under the B. N. A. Act, 1867, sec. 108 and 3rd schedule, and that the making of grants of the foreshore, or land between high and low water, by the Lieutenant-Governor of Prince Edward Island, is inconsistent with the rights of the Dominion Government in the harbour, and therefore the grant under which plaintiff claims is void.

The *locus in quo* in this case is situate between high and low water mark in the harbour of Summerside, P.E.I., which is a public harbour and port for ships where customable goods may be laden and unladen. By section 108 of the B. N. A. Act, 1867, headed: "Transfer of property in schedule," the provincial public works and property enumerated in the third schedule to be the property of Canada are: 1. Canals with lands and water power connected therewith.

2. Public harbours. 3. Lighthouses and piers and Sable Island; and other descriptions of properties, among which are military roads, property transferred by the Imperial Government and known as ordnance property, lands set apart for general public purposes. The property in public harbours being thus vested in the Dominion, the soil ungranted at the time of confederation between high and low water mark, and being within the limits of public harbours, by the express unqualified words of the enactment, became vested in the Dominion as part and parcel of the harbours which belonged as property to the Provinces, as distinct from the franchise of a port, it being clear from Lord Hale: "That the franchise of a port may be in one person and the ownership of the soil within the limits of the port in another."

Thus Lord Hatherley in *Foreman* v. *Free Fishers and Dredgers of Whitestable* (1): "However commodious a place may be for vessels, it will not therefore become a port, the establishment of which must be by authority of the Crown."

And in the same case Lord Chelmsford says: "It appears from Lord Hale, *De Portibus Maris*, chap. 6, that, 'though A. may have the property of a creek, or harbour, or navigable river, yet the King may grant there the liberty of a port to B., and so the interest of property and the interest of franchise be several and divided.'"

The words of the B. N. A. Act are, in my opinion, too clear to admit of any doubt. But it was contended that the public harbours referred to in the B. N. A. Act, were only such public harbours (if any) as the local Governments as such, had acquired an actual, property in, that is to say, artificial harbours constructed by the outlay of moneys and not natural harbours. But I can

(1) L. R. 4 E. & I. App. 266, 281, 285.

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find nothing in the Act to justify this restriction being placed on the clear words of the statute, and if we look to the general scope of the Act in relation to matters with which harbours are connected, I think it is apparent that Parliament intended the words to be construed in their full plain grammatical sense. In the first place, the exclusive legislative authority over the regulation of trade and commerce, beacons, buoys, lighthouses, and Sable Island, navigation and shipping, is vested in the Parliament of Canada; then, secondly, property in canals, with lands and water power connected therewith, and lighthouses and piers, and Sable Island, is specifically transferred to the Dominion. It is but consistent with this that the property in public harbours, so intimately connected with and essential to trade and commerce, and shipping and navigation, lighthouses and piers, should likewise be vested in the Dominion for their more efficient management, control and regulation; a matter in which, not only the whole Dominion, but foreign shipping are likewise interested and which could hardly be effectually managed and regulated if there were to be a divided control. Still less can it be supposed that having vested all matters connected with trade and commerce, and shipping and navigation, and matters pertaining thereto in the Dominion Parliament, the property in and control of the public harbours should have been left to provincial authority. Such being the case with reference to the property in harbours in the Provinces originally united under the B. N. A. Act, 1867, the same is now applicable to the harbours in the Province of Prince Edward Island, it being one of the terms upon which Prince Edward Island was admitted into the union or Dominion of Canada "that the provisions of the B. N. A. Act, 1867, shall, except those parts thereof which are in terms made or

by reasonable intendment may be held to be specially applicable to and only to affect one and not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island in the same way and to the same extent as they apply to the other Provinces of the Dominion, and as if the colony of Prince Edward Island had been one of the Provinces originally united by said Act."

As, therefore, this clause relating to public harbours is alike applicable to all the Provinces, and was in no way varied by the resolutions referred to, the same became applicable to Prince Edward Island as if it had been one of the Provinces originally united by the B. N. A. Act, 1867, and therefore the Executive Government and Legislature ceased to have any property in, or executive or legislative power over, the ungranted lands between high and low water mark in such public harbours as that in question, and as a necessary consequence the grant under which plaintiff claimed, issued by the Lieutenant-Governor of Prince Edward Island under the Great Seal of that island, was of no force or effect, and therefore plaintiff had no right of action against defendant though a wrongdoer.

STRONG, J. :—

This is an appeal from a judgment of the Supreme Court of Prince Edward Island making absolute a rule for a non-suit in an action of ejectment brought to recover possession of a portion of the foreshore of Summerside Harbour. The plaintiff's title consisted of letters patent, under the Great Seal of Prince Edward Island, dated the 30th of August, 1877, by which the Crown, in right of the island, and assuming to act in exercise of authority conferred by a provincial statute, passed long

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before the island became a Province of the Dominion, purported to grant to the plaintiffs, in fee simple, the land sought to be recovered in the action. The first question which arises is as to the title of the Crown in right of its government of Prince Edward Island, it having been contended, on the part of the defendants, that the land in dispute, upon the admission of the island as a Province of the confederation, being part of the soil or bed of a public harbour, became vested in the Crown as representing the Dominion of Canada. If this contention is correct, it follows that the grant under the Great Seal of the island, which constitutes the plaintiff's title, was wholly void and inoperative.

There can be no doubt that by the common law of England the seashore between high and low water mark, or as it is sometimes called the foreshore, is vested in the Crown. Hale, in the treatise *De Jure Maris* (1), says:—"The shore is that ground that is between high and low water mark. This doth, *prima facie* and of common right, belong to the King both in the shore of the sea and in the shore of the arms of the sea."

Chitty, on the Prerogatives of the Crown (2), lays it down that: "The King is also by his prerogative the *prima facie* owner of the shores, (that is, the land which lies between high and low water mark in ordinary tides), of the seas and navigable rivers, and arms of the seas, within his dominions."

In the *Mayor of Penryn* v. *Holmes* (3) Cleasby, B., says: "The *prima facie* title to the foreshore everywhere is in the Crown."

And this general rule of law applies to ports and harbours as well as to the shore of the open sea. In Coulson and Forbes' Treatise on the law of Waters (4), it is said: "The ownership of the soil of all ports, as well as

(1) P. 12. (2) P. 207. (3) 2 Ex. D. p. 332. (4) P. 43.

of the sea shore between high and low water mark, is vested *prima facie* in the Crown, and the Crown might formerly have conveyed the soil to a subject by grant or royal charter, either apart from or in conjunction with the franchise." And the books abound in authorities to the same effect (1).

Therefore at the date of the admission of Prince Edward Island "into the Union" pursuant to the provisions of the 146th section of the B. N. A. Act, the land in question formed part of the demesne lands of the Crown belonging to that Province. Then by the express provision of the 146th section of the B. N. A. Act, upon the admission of Prince Edward Island all the provisions of that Act became applicable to the Province, including the 109th section, which enacted that the public lands should belong to the Provinces in which they were situated, and the 117th section, which provided that the several Provinces should retain their public property not otherwise disposed of by the Act. These lands would therefore have remained the property of the Province after confederation, unless by some particular enactment they were distinguished from the ordinary Crown lands and taken out of the operation of the 109th and 117th sections by being expressly vested in the Dominion. The only section which can have this effect is the 108th, which enacts that: "The public works and property of each Province enumerated in the third Schedule to this Act shall be the property of Canada."

The second enumeration of the schedule referred to is "Public Harbours." The question for our decision is therefore narrowed to this:—Did the 108th section of the B. N. A. Act transfer the property in the soil or bed of this harbour to the Crown in right of the Dominion?

(1) Gann v. The Free Fishers of Whitstable, 11 H.L.C. 192; Attorney-General v. Chambers, 4 DeG. M. & G. 206; Hall on Sea Shores, 13.

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The land in dispute is situate opposite the town of Summerside and forms part of the foreshore or the land between ordinary high and low water marks of Bedeque or Summerside harbour—a harbour of which the public have the common right of user, and which in that sense at least is therefore a public harbour. It does not appear that any public works have been erected or any public money expended for the improvement of, or in any way in connection with this harbour, either by the Dominion Government since, or by the Provincial Government before or since, confederation. I can, however, conceive no other meaning to be attached to the words, "Public Harbours" standing alone, than that of harbours which the public have the right to use, and consequently if a more restricted construction is to be put on those words it must arise from the context or from some other provision of the Act. I find no other provision of the Act conflicting with what thus appears to be the *prima facie* construction of the terms in question.

It is said, however, on the part of the appellants, that the 108th clause itself, or at least the words of the third schedule, which may be read as incorporated with it so exclusively refer to property consisting of public works and which has resulted from the expenditure of public money that it must be taken in the enumeration of public harbours to refer to harbours *ejusdem generis*, and is therefore confined to those harbours which at the time of confederation had been artificially constructed or improved at the public expense. I find nothing in the section and schedule combined to warrant such a construction, which, it seems to me, can only be based on conjecture. The words of the section are "public works and property," and in the schedule, though most of the properties enumerated have resulted from the expenditure of public money, this is not so as to all, for we

find "Sable Island" "property transferred by the Imperial Government, and known as ordnance property," and "land set apart for general public purposes," none of which descriptions imply, as they do not actually include, properties which had been improved at the general public expense.

This argument seems therefore wholly to fail, and we must conclude that there is nothing in the context which would warrant us in restricting the wide general description of "public harbours" to a meaning different from that which the words bear in their ordinary and primary signification.

Next arise the questions—Does the description "Public Harbours" include the bed or soil of the harbour? and if so, is the foreshore also comprised in it? I am of opinion that there is even less doubt on this head than on the first point. By the attribution of the harbours to the Dominion it never could have been meant to transfer a mere franchise to the Dominion Government—that is, to the Crown in right of the Dominion—leaving the property in the soil vested in the Crown in the right of the Province. Such a construction would be so arbitrary, unnatural and improbable as to be totally inadmissible. Who ever heard of such an anomaly as the Crown, as a body politic representing one Government, having a franchise in the property of the Crown itself as a body politic representing a distinct Government? Then the object of vesting the harbours in the Dominion was doubtless with the object of enabling that Government to carry out with more facility such measures as it might, under the power granted to it to legislate on the subject of navigation and shipping, from time to time think fit to enact. And for this purpose it was material that the right of property in the soil of harbours should be under the control of the Dominion, a result which would not

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be attained by conferring a mere franchise or the police power of regulating harbours and taking tolls in them. Further, the taking of tolls or harbour dues would have implied the duty of conservancy, which could not have been properly performed if the bed of the harbour had been vested in a different proprietor. Then there would have been no necessity for this special provision of the 108th section vesting harbours in the Dominion, unless it was intended to vest the property in the beds of harbours, for under the grant of legislative power relating to navigation and shipping, Parliament might have assumed all such powers as would have been comprised in the 108th section, if it were to be construed as a mere grant of a franchise, or police, or conservancy power, or of all these together. The fair inference is therefore that it was intended to transfer the harbours in the widest sense of the word, including all proprietary as well as prerogative rights, to the Crown as representing the Dominion. And this construction is in accord with the presumption of law as laid down by Lord C. J. Hale, *De Jure Maris* (1) who says: "That a subject having a port of the sea may have, and, indeed, in common experience and presumption hath, the very soil covered with water, for though it is true the franchise of a port is a different thing from the propriety of the soil of a port, and so the franchise of a port may be in a subject, and the propriety of the soil may be in the king or in some other, yet in ordinary usage and presumption they go together."

That the foreshore is comprised in and forms part of the harbour and passed to the Dominion under that denomination, is too plain to need demonstration, for it is held by the Crown by the same title and is part of the soil of the harbour, the harbour or port being held to

(1) P. 33.

include all below high water mark. The passage from the text writers already quoted (1) is also to this effect.

The conclusion is that nothing passed to the plaintiffs under the letters patent of 30th August, 1877, and this appeal must consequently be dismissed with costs.

[*Translated.*]

FOURNIER, J.:—

The defendant has been sued for a trespass consisting in the erection of a pier in Summerside harbour on the front of the property of the appellants, plaintiffs in the Court below. The trial took place before a jury who returned a verdict in favour of the appellants. The defendant having moved for a nonsuit or a new trial, the Court below granted a nonsuit. It is from this judgment that there is an appeal.

A statute of Prince Edward Island, 25 Vict. c. 19, authorizes the Lieutenant-Governor in Council, by letters patent, to grant on certain conditions the public beach. By virtue of this statute, letters patent were issued on August 30, 1877, under the Great Seal of the Province, granting to the appellants the tract of land described in the said letters patent. This land is besides specially described as " being part of the shore situated in front of land owned by the said *Robert McCaul* and *Robert Tenson Holman*." The validity of these letters patent has been attacked by the defendant on the ground that the commission of the Lieutenant-Governor does not confer on him express power to make such a grant, and also on the ground that the grant is not made in conformity with the provisions of the Act above cited, which, by sect. 3, requires for the validity of the letters patent the consent of all the owners in front of whose

(1) Coulson and Forbes, p. 43.

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property any portion of the public beach is situated. The Prince Edward Island Railway, now the property of the Government of Canada, and a wharf called the Queen's Wharf, built by the Province as a public work before its union with the Dominion, divide the land of the appellants from the spot where the wharf in question is built. The defendant asserts that according to the Act the consent of the Government of Canada as owner of the said railway was necessary to the validity of the letters patent. He maintains also that the consent of the corporation of Summerside, which, by its Act of incorporation, 40 Vict. c. 15, has power to make regulations for the management of wharves, was also essential to the validity of the said letters patent. There are besides several other objections raised in support of the application for a nonsuit or new trial, but I do not think it necessary to deal with them in order to determine this case if the eighth objection is well founded. This objection is thus expressed: "Because said grant is void on the ground that by the B. N. A. Act all public harbours are vested in Canada, and Summerside is a public harbour."

It is admitted that the evidence shows that the side-lines of the appellant's property, if extended into the harbour beyond the wharf, would embrace the land granted by the letters patent, and in particular the spot on which the wharf in question is built; that Summerside is a natural harbour used in the same way as Charlottetown, Pictou, Halifax, or St John, for purposes of navigation. The admission is thus expressed: "That Summerside is a natural harbour largely used for shipping purposes like Charlottetown, Pictou, Halifax, or St. John."

It is also admitted that the Queen's Wharf is a public wharf, built by the Local Government with public moneys

voted as required, in the same way as in the case of most of the other wharves on the Island; and that this wharf was built about the year 1840, and has ever since been used as a public wharf by the numerous vessels which frequent Summerside harbor.

These admissions establish beyond all question that Summerside harbour is a public harbour. Under sect. 108 of the B N, A. Act, which declares that the public works and property of each Province enumerated in the third schedule of the said Act shall belong to Canada, public harbours being comprised in the enumeration made in the said schedule the property in Summerside harbour belongs to Canada since Prince Edward Island was admitted into the Union. From that time the harbour in question has been under the jurisdiction of the Government of Canada, which has appointed for it a harbour master, entrusted with the regulation thereof, etc., etc.

From the moment when the ownership of the harbour vested in the Federal Government the Government of the island ceased to have any right respecting it. Consequently at the time when the letters patent in question were issued, August 30, 1877, the Government of Prince Edward Island no longer had within the limits of the harbour in question any right of property in the soil forming such harbour. These letters patent are therefore void, inasmuch as they grant to the appellants a part of this harbour which was then the property of the Federal Government.

I am of opinion, therefore, that the appeal ought to be dismissed with costs.

HENRY, J.:—

There is another difficulty, too, which presents itself to my mind, in addition to those mentioned by my

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learned colleagues, and that is that since confederation, even if the Local Legislature had the soil of the harbour, the public had an easement—that is the whole public (not the public of Prince Edward Island, but the public everywhere) had a right to an easement of the wharves, and if the legislature of Prince Edward Island assumed the right of granting the land between low water mark and high water mark, they might carry that still further, and grant the soil so as to be injurious to the whole shipping interest. I think, therefore, that ever since confederation, even if the soil did belong to Prince Edward Island, and its legislature had the right to dispose of the soil, which I think it had not, there was an easement that the public had in it that the Local Government had no right to obstruct by granting the sole right to other parties to occupy the waters of the harbour by putting up buildings, erections or in any other way impeding the passage of it. I concur in the views expressed by the learned Chief Justice and those who have preceded me.

GWYNNE, J.:—

To the real question which is involved in this suit, the only answer which can be given is in the negative; that question is—Is a deed executed by a Lieutenant-Governor of one of the Provinces of this Dominion with the public seal of that Province thereto annexed, competent and effectual to transfer to a person named in such deed as vendee, the legal estate in property which, by force of the provisions of the B. N. A. Act, is vested in Her Majesty for the public purposes of the Dominion, and is for that reason expressly placed under the exclusive control of the Dominion Parliament?

Upon Prince Edward Island being admitted into the Dominion, an event which took place upon and from the

1st July, 1873, the legislative authority of the Parliament of Canada (by force of sec. 91, item 1, and of sec. 108 and item 2 of the schedule therein referred to of the B. N. A. Act) became absolute and exclusive over all public harbours situate in the island. Her Majesty remained seized of those harbours and of the land covered with the waters thereof, *jure regio*, for the public purposes of the Dominion and subject to the exclusive control of the Parliament of Canada.

Under the provisions of the Dominion Statute, 37 Vict. c. 34, and the Orders in Council made in pursuance thereof, the Dominion Government has assumed control over the piece of land situate in the harbour of Summerside, and which the plaintiffs claim to be their property under and in virtue of a deed dated the 30th August, 1877, purporting to be executed by R. Hodgson, Lieutenant-Governor, with the Great Seal of the Province of Prince Edward Island attached. It is contended that this deed is valid and effectual to transfer to the vendee named therein the land therein described, by force of two statutes of the Province, passed before the passing of the B. N. A. Act, viz., 15 Vict. c. 7, and 25 Vict. c. 19; but it is obvious that upon the Province being admitted into the Dominion under the provisions of the B. N. A. Act, the executive authorities of the Province under its new constitution could have no power, statutory or otherwise, to sell property placed for Dominion purposes under the supreme control of the Dominion Parliament, and that the property in question is such property cannot admit of a doubt. The deed, therefore, under which the plaintiff claims is inoperative and void, and the nonsuit was therefore, right, and the appeal must be dismissed with costs. It is a matter of no importance that the defendant has no right either to the land in question, or that his acts at the place in question are punishable under the

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provisions of the Dominion Statute, 37 Vict. c. 34, and the Orders in Council issued thereunder. For the purpose of the present action it is sufficient to say that the plaintiff has no title to the land in question.

Appeal dismissed with costs.

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

1875*
Feb. 17.

EX PARTE CLEMENT ARTHUR DANSEREAU.

[*Reported 19 L. C. Jurist, 210.*]

Legislative Assembly of Quebec—Powers and Privileges of—35 Vict. c. 5, Q.

Provincial Legislatures have as incident to their express powers under the B. N. A. Act the right to summon witnesses and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation and the control assigned to them in respect of the administration of public affairs.

The provisions of the Act of the Quebec Legislature, 35 Vict. c. 5, regulating this right, are valid.

Ramsay, J., dissenting.

The petitioner (Feb. 13) prayed for the issuing of a writ of *habeas corpus* addressed to Charles Garneau, Serjeant-at-Arms of the Provincial Legislature of Quebec, commanding him to bring the body of the petitioner, and for the setting aside of the warrant of arrest under which the petitioner was arrested, as being illegal.

The writ was ordered to issue, and counsel were heard thereon.

The reasons assigned on behalf of the petitioner were substantially the same as those urged in the case of *Cotte* and *Duvernay*,† which came before Mr. Justice Ramsay, a Judge of the Court of Queen's Bench, in Chambers, a few days previously.

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*Present:—DOSSON, C. J., MONK, TASCHEREAU, RAMSAY and SANBORN, JJ.

†In the above case, *Carter*, Q.C., for the petitioners, submitted the following propositions:

1st. That the House of Assembly of Quebec does not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of doors.

2nd. That the power of the House of Commons in England was part

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STATEMENT.

The witness *Dansereau* was in the same position as *Cotte* and *Duvernay*, but as the Court was about to sit, the writ in his case was made returnable in term. The Court (Feb. 17) rendered judgment, sustaining the warrant and quashing the writ of *habeas corpus*.

RAMSAY, J.:—

Immediately after the judgment in the cases of *Cotte* and *Duvernay*, rendered by me in Chambers yesterday week, a petition was presented to me for a writ of *habeas corpus* in the present case. It was taken as a matter of course that I would issue the writ and decide it at once; but as the Court was to sit within three days, I availed myself of the power granted by sub-s. 2, s. 22, c. 95, Con. Stat. L. C., and made the writ returnable in term. By this means an opportunity is afforded of obtaining, if not a final decision on a question involving important inter-

of the "*Lex et consuetudo Parliamenti*," and the existence of that power does not warrant the ascribing it to every Legislative Council or Assembly in the colonies, although its legislative powers might be general, and not restricted as are those of the Local Legislature.

3rd. That the power of the House of Commons in England to compel the attendance of witnesses is based upon the fact that it is a Court of Record, which the Legislative Assembly is not.

4th. That the House of Commons in England, although possessing the power of a Court of Record to enforce the attendance of witnesses, did not possess the power of administering an oath to witnesses until in 1871, by Imperial Act 34 and 35 Vict. c. 83, that power was granted, and therefore the Quebec Legislature could not validly pass an Act to confer on committees the power of examining witnesses under oath—a right which was not granted until 1871 by the Imperial Parliament to the Commons of England.

5th. That the authority of the Local Legislatures is expressly limited by the Union Act to the subjects specially assigned to them, and that they possess no authority or jurisdiction beyond such special designation.

6th. That the legislative authority in matters concerning *the peace, order and good government of Canada*, in relation to all subjects not specially assigned to the Local Legislatures, is conferred upon the House of Commons by the 91st section of the Union Act; and if the power to pass a law giving committees the authority of administering an oath to witnesses was not within the jurisdiction of the House of Commons of Canada, under the Union Act, as established by the disallowance of the Bill passed

ests, at least the opinion of the full Court of Queen's Bench.

I have so recently expressed my opinion on this matter (1)—an opinion which remains substantially unchanged—that I shall confine my remarks to what appears to be new in the arguments of the learned counsel for the Speaker.

And, first, I must express astonishment that one of the learned counsel should have reproduced with deliberation the unsustainable proposition that I had no authority to issue the writ now before the Court. It will strike criminalists as a doctrine somewhat novel that a man detained under a warrant of arrest cannot obtain a writ of *habeas corpus* on production of the warrant, without affidavit. Section 1 of our Habeas Corpus Act (cap. 95, Con. Stat. L. C.) reads as follows:—

1. "All persons committed or detained in any prison

to administer oaths to witnesses on the Pacific Scandal Enquiry, 36 Vict. c. 1, it necessarily follows that the Act of the Quebec Legislature, 33 Vict. c. 5, passed in 1870, transcends even the power vested in the Senate and House of Commons of Canada, and is *ultra vires*.

7th. That the Legislature of Quebec is to be regarded as a body of limited jurisdiction only, having no legislative powers derivable from the common law, but simply those created by statute; and it possesses no inherent powers or judicial functions such as could be assigned to or be exercised by a Court of Record.

8th. That the enquiry instituted by the Legislature of Quebec in the present instance was not incident to the exercise of the legislative authority specially assigned to it by the Union Act, and by reason thereof the appointment of a select committee to enquire into what is popularly known as the "Land Swap" was beyond its powers as a Legislature, and under the Union Act, sec. 65, could only be validly exercised by the Lieutenant-Governor in Council, under Royal Commission.

9th. That the Legislature of Quebec having only a limited jurisdiction, deriving its efficacy solely from statute, and out of the course of the common law, the warrant of the Speaker, in order to render it valid, ought on its face to disclose by direct averments the facts and circumstances relied upon for the exercise of the jurisdiction claimed; whereas the warrant of the Speaker wholly failed to disclose any authority personal to himself as such Speaker, or in the Legislative Assembly of Quebec, to order the arrest of the petitioner, and is therefore absolutely null and void.

(1) See note *post*, p. 220, *Cotte's Case*.

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within Lower Canada, for any criminal or supposed criminal offence, shall of right be entitled to demand and obtain from the Court of Queen's Bench, or from the Superior Court, or any one of the judges of either of the said courts, the writ of *habeas corpus*, with all the benefit and relief resulting therefrom, at all such times, and in as full, ample, perfect, and beneficial a manner, and to all intents, uses, ends and purposes, as Her Majesty's subjects within the realm of England, committed or detained in any prison within that realm, are there entitled to that writ, and to the benefit arising therefrom, by the common and statute laws thereof."

Section 4 runs thus:—

"And if any person is committed or detained, as aforesaid, for any crime (unless for felony or treason, plainly expressed in the warrant of commitment) in the vacation time, and out of term or sessions, such person (not being convicted or in execution by legal process), or any one on his behalf, may complain to one of the judges of the Court of Queen's Bench, or Superior Court, who upon view of the copy of the warrant or warrants of commitment and detainer, or otherwise, upon oath made that such copy was denied to be given by the person in whose custody the prisoner is detained, *shall*, upon request made in writing by such person, or any one on his behalf, attested and subscribed by two witnesses present at the delivery of the same, award and grant a writ of *habeas corpus*, under the seal of the court of which such judge is a member, directed to the officer or person in whose custody the party so committed or detained is, returnable *immediatè* before the said judge.

Section 20 is for persons confined by civil process, or restrained of their liberty otherwise. This is to be gathered, not from the rubric, as was presumed at the argument, but from the dispositions of the section which

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the rubric, sufficiently for the purpose, enunciates. To have dealt, then, with the application in this case under section 20, I must have supposed that the arrest was on a civil process. As the warrant did not pretend to be of this nature, the supposition would have been most gratuitous, and to have arrived at it I must have had the ingenuity to discover that a warrant of arrest of the Speaker could be a summons.

A summons differs essentially from a warrant in this, that it is not an attachment. The persistence in calling this attachment a summons can have no effect but to lengthen the discussion. A summons may be for a criminal matter, under statute, but an attachment is presumably for criminal matter, and the only exception I know is the attachment on *capias* for debt. If Mr. *Dansereau* had been committed on a *capias*, I should certainly not have issued the warrant without an affidavit. If, however, the theory of the Speaker's counsel were to prevail, then the more meagre the warrant, the more difficult it would be for a person incarcerated to get out of prison, and the judges would have to presume a civil process behind an attachment almost in blank, unless there was an affidavit of circumstances on the part of the prisoner.

In support of this curious pretension, *Hobhouse's Case* was cited. It is certainly very edifying to have in a case like this, where it is sought to reconcile the public mind to the exercise of arbitrary privileges, the extraordinary and unjustifiable proceedings against Mr. Hobhouse unnecessarily forced on our attention. That *seditious* person became a minister of the Crown, was created a peer of the realm by Her Majesty, and died covered with honours only a few years ago. It will not, however, be necessary to overthrow the decision in that case in order to meet the argument of the Speaker's counsel, for the case is no way in point.

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In the first place, I may observe that I never said that the Court was obliged to issue the writ. In effect I said what I conceive the statute says: that in process not civil, when the warrant is defective in not setting out a felony or treason plainly, and where it does not appear that the prisoner is in execution of a sentence of a legal court, a judge in vacation and out of term (not the court) must issue the writ on view of a copy of the warrant, or on affidavit that a copy has been refused, under a penalty of £500 sterling. In order to have a *dictum* overruled, it is necessary to set it out in technical and precise language, and not in the loose phrases of conversation. I may further add, that it never was supposed that *Hobhouse's Case* decided the question of the duty of a judge in chambers and out of term. See the *quære* in Hammond's Term Index.

In the second place, the warrant in *Hobhouse's Case* was a commitment in execution by the House of Commons, who, in virtue of their enormous privileges (privileges to which the learned counsel for the Speaker of the Legislative Assembly avows he has no claim), can commit by general warrant. Now, it will be remembered that where there is a commitment in execution, the writ does not issue, of course.

In the third place, our Habeas Corpus Act goes further than the statute of Charles. It applies to bail, as we see by the preamble; our Act, which is more extensive, has no such restriction. Section 4 of our Act refers to common law commitments, as well as to applications in bailable offences; and section 18, which enacts the penalty, applies to all that precedes. I therefore hold that I was right in issuing the writ on view of the warrant, as the statute directs; and I may further intimate that it is a practice to which I intend to adhere so long as the law remains unchanged.

The tone of a remark of one of the learned counsel for the Speaker was sufficient to show the immense importance in a constitutional point of view of the enterprise which we are called upon to sanction. While on the one hand we are told that claim is not laid generally to *all* the powers and privileges possessed by the House of Commons,—that all that is desired is simply to be able to send for persons and papers in order to make enquiries for the purposes of legislation, and that the warrant is simply a summons; on the other hand, we are told, as a matter of congratulation, that since the attachment of Mr. *Dansereau*, the Legislative Assembly has asserted its dignity by an attachment for a libel. We should be deceiving ourselves if we entertained the idea that the real point here is, whether or not the power to compel the attendance of witnesses for the purpose of the proceedings and deliberations of the House, alone exists as a privilege necessary to its being. The form of the warrant before us, and the boast of the Speaker's counsel, are more significant than the formal renunciation of the claim to all the powers, privileges, and immunities of the Commons. If the House can arrogate to itself the right to compel the attendance of witnesses, and can attach for libel on the most general of general warrants, I should be glad to know which of the privileges of the House of Commons it cannot claim as necessary to its existence? Nay more, the subject of the public felicitations of the learned counsel for the Speaker happens to be the exercise of an authority not only not given to the Local Legislature, but exclusively given to the Dominion Parliament; for it is a trial for libel, a clearly defined crime, and it is in excess of the powers exercised by either of the Houses in England. Sir Erskine May says, Vol. 2, p. 276:

"While Parliament continued to wield its power of commitment capriciously and vindictively—not in vin-

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dication of its own just authority, but for the punishment of libels, and other offences cognisable by the law—it was scarcely less dangerous than those arbitrary acts of prerogative which the law had already condemned as repugnant to liberty. Its abuses, however, survived but for a few years after the accession of George III."

But to take the more plausible pretension put forward for the House of Assembly. They say, "We must have incidentally the powers necessary to our existence; it is necessary to our existence that we should be able to make enquiries, and we cannot make enquiries unless we can compel the attendance of witnesses." No one contests the first and second of these propositions; but what is said is this, that the right to compel the attendance of witnesses is not essential to making enquiries. People in every-day life make enquiries constantly, yet they have no power to compel their neighbours to come in and give them their advice. The Crown too requires to make enquiries much more urgently than either House of Parliament; but it has no power to this day, in England to compel the attendance of witnesses before its commissioners. Two cases were suggested by counsel, to shew that the power to examine witnesses was essential to the House. One was to prove the preamble of a private bill; and the other, corruption on the part of a member.

If it were necessary to have the power to compel the presence of witnesses in *certain cases*, it does not follow that the House should have the power inherently in *all*; so that, unless it can be shewn that this is one of those cases, the argument would not help the pretension ostensibly put forward. But the preamble to a private bill has never been *proved*, in the strict sense of the word. It is substantiated to the satisfaction of the committee, and that is all. It is only by the Act 21 and 22 Vict. c. 78, that committees in England have the

power to examine witnesses on oath; consequently a committee is not at common law restricted in any way as to the extent of information it should have before it declares the preamble proved. In practice it is hardly possible to conceive the necessity of compelling witnesses to appear, to prove or disprove the preamble of a private bill. The parties interested in a private bill are under a compulsion much more stringent than the most enthusiastic advocate of privilege could devise, to come in and say their say to the committee. I have seen warm debates as to the right to produce evidence on private bills. I remember of no case where it was necessary to compel the attendance of persons. But in any case, if we are to build up the right for the House of Assembly, on any grounds of necessity such as that insisted on, we must say, by parity of reasoning, that the Corporation of Montreal has a similar right on an application to put up a steam engine in a back street.

The other instance, that of a member guilty of corruption, is still less conclusive. It is hardly possible to conceive a case more plainly beyond the jurisdiction of the local Governments than the trial of a member for a crime, such as that of taking a bribe. I have always understood that the House would not take notice, even of a charge of felony, until after conviction, and the seat is vacated by operation of law, because the convict is *mortuus civiliter*. A seat is not vacated for a misdemeanor, except perhaps perjury, no matter how heinous, and the instances we find of the arbitrary expulsion of members (of which there are some) are not of a character to impress one with the opinion that a power to expel is essential to the very existence of each Legislative Chamber.

To take another test: let us suppose that a judge were accused of taking a bribe—would it be thought

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to be a power necessarily inherent in the court to which he belongs to make an enquiry, out of the ordinary course of law, for the purpose of suspending or of expelling him? It is plain that if such a power is essential to a Legislative Chamber, it is also essential to a court; yet no one pretends that courts, with all their privileges, real or pretended, have ever claimed such a right. One, and the most famous case of the expulsion of a member of the House, is that of Wilkes. It ended in all the declarations, orders and resolutions, respecting the Middlesex election, being expunged from the journals as subversive of the rights of the whole body of the electors of the kingdom. (1) This result is a perpetual commentary on the great necessity argument.

Again, it is not sufficient to say that it is necessary because committees in England have the right to send for persons and papers. For, for the hundredth time it must be repeated, it appears that the English right depends not on necessity, but on usage. It is perfectly evident that if the House may compel the attendance of witnesses, it may compel the production of "papers and things." Now let us see how far this leads us. Not only may a man be interrogated by the members of a body not logically trained to decide nice questions of evidence, and consequently totally unfit to limit an enquiry to its just proportions, but it may compel him to produce his private papers, and every moveable in his possession for their inspection. I know one of the learned counsel for the Speaker recoils from the test of his pretensions by extreme cases. The *reductio ad absurdum* is, however, a perfectly legitimate process of reasoning, and applied to the particular point before us it exhibits in relief the monstrous nature of the pretensions put forth by the House of Assembly. If they succeed in maintaining their

(1) May's Const. History, vol. 1, p. 407.

claims, I will not say they have established "an organized chaos," for I am not sure I fully understand the value of these words in the relation in which they have been placed; but this I will say, that a body of limited and local authority has, in violation of the most clearly expressed intention of its charter, organized for itself an arbitrary system of government totally subversive of individual liberty. It is needless to cite the case of *Anderson* v. *Dunn*, for it was examined in the case of *Doyle* v. *Falconer*; and whether *Anderson's Case* was decided rightly or the reverse, it cannot weigh with us, for its authority was rejected by the Privy Council.

I was particularly anxious to avoid any allusion to the well-known circumstances which gave rise to the present proceedings; for although I am aware that the convenience of the object to be attained will to a great measure absorb public attention to the exclusion of the weightier considerations, and although I by no means undervalue the importance of making the decisions of courts intelligible to those who have not made a special study of law, it struck me that an argument based on a question on which the public mind seems to be disturbed, perhaps more than the occasion requires, might lead to greater misapprehension than a mere technical discussion of the points involved. But the power to abstain from the consideration of the Tanneries enquiry, as an illustration, has slipped from my hands by the frequent allusions that have been made to it. I enter on it, then, but merely as an illustration, and without expressing any opinion, or really having any settled opinion as to the full merits of the question by itself.

It seems, then, that the opinion is prevalent that either by want of due diligence on the part of the Government last summer, or by bad faith on the part of one or more of the Ministers, and want of due

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care and diligence by the others, a bargain excessively injurious to the pecuniary interests of the Province was entered into. Now, it is desired to examine into how far those opinions are true; and it is contended that such an enquiry is absolutely necessary, in order that the House of Assembly may perform its functions. It may fairly be asked of those who advance this argument, wherein this necessity consists? It is evidently, not a political necessity, for the country exercised its jurisdiction, and gave its decision, in no equivocal manner, months before the Legislature met. It cannot be with a view to legislation, for it may be presumed the House does not purpose to enact a law to annul the bargain complained of. The only conceivable question that remains is an executive one, namely, whether the validity of the deeds should be contested, or whether criminal proceedings should be taken against any of the parties accused? Now, for either of these purposes, it would be manifestly unfair and improper to subject witnesses compulsorily to the interrogations of the complaining party.

The impropriety will appear more manifest when it is remembered that it was formally announced, at the opening of the proceedings here, that the committee would not be bound by the legal rules of evidence; in other words, that the committee would disregard in this quasi-criminal investigation those rules which experience has established as the best mode of discovering truth.

It must not be concluded from what I have said, that the House can make no enquiry; all I say is this, that the House requires no arbitrary powers to enquire, and to arrive at a result sufficiently satisfactory for all practical purposes. If men refuse to answer questions under suspicious circumstances, so much the worse for them. Take, for instance, one of the

questions to which, I believe, an answer was refused: "How have you $17,000 at your credit?" I understand the witness said it had nothing whatever to do with the Tanneries exchange, but he declined to say what transaction it represented. He gave a categorical answer, which does not, perhaps, give all the assurance desirable; and without the exercise of any arbitrary powers, the Committee may be guided in its conclusions by this unexplained reticence. I do not know, of course, nor do I wish to express any opinion as to what conclusion should be arrived at, for I have not read more than the most minute fraction of the evidence, but those whose business it is to know all about the matter will probably not be much embarrassed.

Another species of reasoning was brought into play. It was asserted that the Local Legislatures were not of a subordinate character. If it be necessary to the Speaker's argument to maintain this proposition generally, his case would be in great jeopardy. I readily admit that within the scope of its own functions it is not subordinate, except in so far as its new legislation may be disallowed by the Executive branch of the Dominion Parliament. I do not desire to say unnecessarily what may be offensive to a body of very great position and authority, but since the comparison (proverbially odious) is thrust upon us as an argument, I shall not avoid saying what is evidently true. Its inferior dignity and rank to those of Parliament are marked in every way—by the appointment of its highest branch by the Executive of the Dominion, by its powers being special and not general, by its territorial jurisdiction being less extensive, and, above all, by its legislation being subject to disallowance by the Governor-General.

Again, in referring to the case of the *Speaker of the Legislative Assembly of Victoria* v. *Glass*, we were told

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that the dignity of the Legislative Assembly of Victoria was not greater than ours. Without having the charter before us we could not decide that question, which, however, is of no importance. Whatever its dignity may be in the abstract, the power to legislate on matters of this sort was specially allowed by its charter, and that is the avowed reason of the judgment of the Privy Council. That case is therefore an authority against the Speaker in the present case.

Mr. *Loranger* seemed by his argument to abandon the extreme pretension that the House could commit for a contempt. But to abandon this is to abandon everything. The warrant in the present case either presumes a contempt, or the pretensions of the Legislative Assembly of Quebec are more enormous than those of the House of Commons; for then, to justify the proceedings, we should have to say that they claimed the right to attach without a cause at all.

This pretension is original. Citing the case of *Burdett* v. *Abbott* (another case almost as suggestive as the *Hobhouse Case*, of the dangers of allowing individual liberty to be spirited away under the specious guise of convenience), Mr. Justice Badgley said in the *Lavoie Case*: "Yet, if the commitment should not profess to be for a contempt, and the matter appearing in the return as the ground of the commitment could by no reasonable intendment be considered a contempt, and the commitment, therefore, evidently arbitrary, unjust, and contrary to every principle of positive law or natural justice (which, however, may not be anticipated to occur), the court would, it seems, not only be competent, but bound to discharge the party" (1). If this is not an attachment for a contempt, then it is evidently arbitrary, unjust, and contrary to every principle of natural justice. Besides,

(1) 5 L. C. R. p. 132.

if it were conceded that this attachment were not, of itself, a commitment, of what use would it be if the House could not commit in the end?

If, again, we examine the plea of necessity by the light of the three authoritative cases decided in the Privy Council, we find that very serious interruption of the business of the House did not justify a commitment on the ground of necessity.

Once more, if we examine it historically, we find it not only the pretext of oppression all over the globe, but very specially that most successfully combated by our race. The noble tale of English history—the beacon—the guide to all those who possess or strive to obtain individual liberty within the law, constantly appealed to even by those who like it least in the abstract—teaches us a lesson, not of resistance to prerogative, but to all abitrary and undefined powers whatever, no matter how artistically they may be dressed up. I know of no claim of prerogative or privilege which has not come backed by the plea of necessity. It was the defence of Secretary of State warrants general, though hardly so general as the one before us it was the defence, I dare say, of *lettres de cachet*; it was the origin of the right claimed by members of the English House of Commons to commit as for a contempt any one who should encroach on the fishery of a member of the House. I doubt not the Irish courts thought it was sufficient excuse for the pretension they once put forth, that as every crime was a contempt, they could try and punish criminals on attachment without the intervention of a jury.

To-day we are cajoled with the plea of necessity on one point which perhaps it might not seem very disastrous to concede, save for the evil precedent, and on the eve of this argument a legislator, personally offended, informs us that this argument is a subter-

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fuge. It is not public convenience they seek to further, but to protect their own dignity. So the individual liberties of the people are to be sacrificed to gratify the vanity of the people's representatives, and those accused of crimes affecting a member of the House may be tried, not by their peers, but by those whose feelings of personal dignity are involved in the issue. I have heard it said that the case I refer to, that of a person supposed to be the writer of an article reflecting on a member, has been inopportunely brought up. I think the very reverse. The public should be obliged to the member who has furnished a more extreme case as an example, in order to show the danger lurking under that now before us.

I have entered at some length on this branch of the case, because it covers the only debatable ground. If this warrant cannot be defended on the plea of necessity, it cannot be defended by any text of law. And it appears to me, with increasing force, the more I look at the question, that the assumption of power constructively on the ground of necessity must be restrained to its narrowest limits; and so restraining it, I cannot hold that it is necessary to the existence of every legislative body to have the right to compel the attendance of witnesses generally. And therefore, to borrow from a speech of my learned brother Sanborn on a famous occasion, I would call all such necessities as these entirely "artificial."

The next question, as to whether we can look into the constitutionality of a local law, seems to suffer no difficulty, if an almost unanimous expression of opinion of those best qualified to judge be considered as authoritative for the decision of a practical matter. But one point was made at the arguing, that it would be very inconvenient if every Justice of the Peace had the power

to judge of the constitutionality of a law. But judging the constitutionality of an Act is only giving a judgment on the extent of an Imperial Act, and I do not see that this is more difficult than giving judgment on a Dominion Act. It is as easy to decide whether an enactment is within the B. N. A. Act, as it is to decide whether a man has committed a commercial fraud within any of the recent statutes. A magistrate has to do the one, why should he not do the other? In the speech of my learned brother, to which I have already alluded, I find this statesmanlike exposition of the danger which now menaces the petitioners before us :—

"Hon. Mr. SANBORN—If my honourable friend would take that platform, or something like it, I should be happy to give it my best consideration at once; and I should be very glad if they would only give us a small part of it, of which I think they must see the justice—namely, *written guarantees*, so as to assure us that our rights of property shall not be overturned by the Local Parliament; to prevent, for example, a Squatters' Bill being passed at the very first opportunity in the Local Parliament, demolishing all the rights of property. I see my honourable friend opposite (Hon. Mr. Crawford) look melancholy, because he foresees that, when the new Constitution is adopted, twelve months will not pass before that becomes law in Lower Canada, and all protection for proprietors, so far as that is concerned, brought to an end. But this is only one instance significant of what will take place. It is perfectly well known, and none can realize it better than those who have a much greater horror of the progress of popular sentiments than I have, that the tendency in the popular mind is to break down monopolies of every kind, and to go to extremes in dealing with vested rights, even those which are established and founded on substantial

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principles of justice. Now, these rights, at the very least, ought certainly to be confided to the highest legislative authority. I go further, and maintain that guarantees for those rights ought to be placed in the written Constitution, that they ought to be beyond the power of interference by the legislative authority, and that they should be guarded by the judicial decisions of the highest courts in the country. In that case there would be a protection for property, but in this Constitution there is no such protection for property either in Upper or Lower Canada. And here is the point to which I ask the attention of my honourable friends of all parties—a point which I think all of them have been too little concerned about, and which applies just as well to Upper as to Lower Canada. For I say that, if some security is not given to the people in one of those ways for maintaining vested rights and interests of this character, the most disastrous results will arise in every Local Parliament; because, when these Parliaments are constructed, they will necessarily consist of a different class of men from those who now compose the Legislatures of the various Provinces. There will be such inducements to men of the highest order to get elected to the Central Parliament, that the consequence will necessarily and naturally be the result to which I point."

It is just this sort of danger, so prudently and eloquently foreshadowed the law has, in my view, provided against. But what would the provisions of a written constitution and precise guarantees avail in the face of the paraphernalia of constructive powers, and the construction of "artificial necessities?"

Having then the power, and it being our duty consequently to look into the constitutionality of an Act of the Legislature, we must ask on what is the privilege founded? Reliance is principally placed on sub-s. 1 of s. 92, B. N. A.

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Act—the clause giving power to amend the Constitution of the Province, except as regards the office of Lieutenant-Governor. Without entering into any question of what in the abstract may be called a part of the Constitution, the form of the Act clearly shows that it refers to the clauses 58 to 90, which are all under the general rubric, "Provincial Constitutions." Now, it is very true that a rubric is not an enactment, but it is not less true that a rubric existing in the original Parliament roll may be used in the interpretation of a vague clause, just as the preamble may be used. But what is the general power to alter the Constitution, if it applies to any other matters than those specially called constitutional in the Act? Taken in its widest sense, it would be the power to upset the whole B. N. A. Act; and under this interpretation the Local Legislature, having more extensive powers than the Dominion Parliament (this was gravely advanced at the bar), like the lean kine, may eat up the fat.

These are propositions which best refute themselves even when advanced in support of an arbitrary power in the ascendant, and I might, perhaps, then leave this one to the decision of the impartial; but the statement that the Local Legislatures have in any respect greater powers than the Dominion Parliament, is not only paradoxical—it is fallacious. They have different powers, and among them that of altering their Constitution save as to the Lieutenant-Governor. This power was given to them because, except in the one particular reserved, it was not considered to be of any importance what form the local Governments assumed; but an analogous power could not be given to the general government of a dependency of the empire. It is another proof, if any were needed, not of the importance of the local Government, nor of the magnitude of the

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powers conferred on them; but it is a proof of their relative insignificance.

The last question, and the most important, is the warrant of attachment. I think I have heard this part of the question talked of lightly as a mere matter of form, and consequently of little importance; and so people are deluded by sound. There are forms which are of no importance; but there are forms which are of the most vital importance. It signifies little how your coat is shaped; but it is a matter of moment to the most callous whether he is thrown into prison according to the forms of law for a specified offence, or without any intimation of what he is accused of, on the mere whim of a superior. Therefore it is a deceit to call this a mere matter of form, for the form is substantial. Of such all-absorbing interest is the form here, that I would readily enough admit that I see no great objections in practice to the Legislative House holding powers strictly defined (not defined by a general reference to the exorbitant privileges theoretically claimed by the House of Commons in England, but defined as the powers of this Court are defined); but a general warrant, which is nothing more than an order to the Serjeant-at-Arms to arrest A. or B., without expressing any cause whatever, cannot be justified on necessity by the most obsequious defender of arbitrary power. It is neither more nor less than a *lettre de cachet*. The consequence of granting it is to give the Local Houses, respectively, unlimited authority over the persons and property of Her Majesty's subjects. It is possible that the tyrant may be merciful and good, but he is not less a tyrant, or what the Emperor of Russia called himself to Mme. De Stael, who was complimenting him on the beneficence of his rule—*un heureux accident*. Such an accident, however, is a disagreeable sword impending over our heads, and I

should prefer to diminish by positive law, as much as may be, the dangers attending it.

When the political organization under which we now live was under discussion, the learned Chief Justice who presides over this Court, so entirely to the satisfaction of all those who have business here, used these remarkable words, which I venture to recall to his memory as perfectly applicable to the present case: "I know," he said, "that majorities are naturally aggressive, and how the possession of power engenders despotism, and I can understand how a majority, animated this moment by the best feelings, might in six or nine months be willing to abuse its power and trample on the rights of the minority while acting in good faith, and on what it considered to be its right."

If my words do not carry sufficient weight, let minorities take warning from those I have just quoted; let us beware in time, lest we are organizing despotism. In this fatal session, in which general warrants in their most dangerous form have been resuscitated, we have had an instance of a Bill supported by the presence of a turbulent mob, which invaded the House of Assembly, and by its proceedings reminded one of the action of the Commune. Where then were the boasted powers of the House? These "artificial necessities" had disappeared with the occasion when they might have had something to recommend them, and we find the chairman censuring the gentlemen in the galleries in a tone rather of apology than of expostulation. *L'Arbitraire* has nothing to recommend it. It is pregnant with evil, and incapable of good. Let majorities take warning; they may become minorities.

For my part, I have no hesitation about the illegality of general warrants. On this question there can be no compromise. My duty to the State, as a subject and as a magistrate, is too clear to be misunder-

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stood. I must resist them morally with all the arguments I can command, materially with all the authority I may possess. I hold that they are unknown to the law, and that the precedents cannot legalize them. As Chief Justice Pratt and the other judges of the Common Pleas said, in giving the death-blow to general warrants issued by the Secretary of State, "no degree of antiquity can give sanction to an usage bad in itself." (1) The power to issue a general warrant is given by no statute to the Commons of England; by section 18, B. N. A. Act, it is refused to the Houses of Parliament of Canada; and it is denied to all persons by many statutes in express terms. (See the Petition of Rights and 16 Charles I. cap. 10.) With one quotation from the greatest of our political writers, I shall conclude. Burke says:

"But if the habit prevails of *going beyond the law*, and superseding this judicature, of carrying offences, real or supposed, into the legislative bodies, who shall establish themselves into *courts of criminal equity* (so the Star Chamber has been called by Lord Bacon,) all the evils of the Star Chamber are revived. A large and liberal construction in ascertaining offences, and a discretionary power in punishing them, is the idea in *criminal equity*; which is, in truth a monster of jurisprudence. It signifies nothing whether a court for this purpose be a Committee of Council, or a House of Commons, or a House of Lords; the liberty of the subject will be equally subverted by it. The true end and purpose of that House of Parliament, which entertains such a jurisdiction, will be destroyed by it."

DORION, C. J.:—

The grounds on which the petitioner relies for demanding his release are—1st. That the warrant

(1) May's Const. Hist., vol. 2, p. 258.

on which he was arrested is general, and does not set out any special reasons for his arrest; 2nd. That the Speaker of the Legislative Assembly of Quebec had no right or power to issue such a warrant; 3rd. That the Act of the Legislature of the Province of Quebec, whereon it is pretended the warrant was issued, is unconstitutional, null and void, being *ultra vires* and beyond the powers of that Legislature to pass. The 4th and last ground is general, and merely states that the proceedings under which the petitioner was arrested are null and void.

On behalf of the Speaker of the Legislative Assembly, it has been contended that the right to arrest for contempt is a privilege which belongs to the Legislative Assembly, and that any action taken to commit for such contempt could not be questioned before courts of justice. We are not, fortunately, without precedents on this point, which has been repeatedly raised before the courts in England, as regards the privileges of the House of Lords and of the House of Commons, and settled by the latest decisions in a way which leaves no doubt that this court has the unquestionable right to examine into the causes of arrest of any party claiming to be illegally held under duress. The case of *Stockdale* v. *Hansard* (1), and that of the *Sheriff of Middlesex* (2), have, it may be said, definitively settled that point. In this last case Lord Denman, C.J., used most emphatic terms, and in rendering the judgment of the court, said: "I think it necessary to declare that the judgment delivered by this court last *Trinity* term in the case of *Stockdale* v. *Hansard* (1) appears to me in all respects correct. The court decided there that there was no power in this country above being questioned by law. The House of Commons there attempted to place its privi-

(1) 9 A. & E. 1.

(2) 11 A. & E. 273, 285.

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lege on the footing of an unquestionable and unlimited power. It was argued against that claim that the *dicta* of learned judges by which it was supported had in many cases been hastily thrown out, and were encountered by others of a contrary tendency from judges not less eminent, and by precedents. I endeavoured to establish that the claim advanced in that case tended to a despotic power which could not be recognised or exist in this country, and that the privilege of publication as there asserted had no legal foundation. To all these positions I, on farther consideration, adhere; all of them I believe in my conscience to be true."

Having therefore the power to enquire into the causes of the detention of the petitioner, we have to consider whether his first objection, that the warrant is general, is a valid one. On this point I am disposed to agree to almost every word said by my learned brother on my right, who differs from the majority of the court as to the objectionable character of such warrants. I cannot better express my own views on this question than by repeating the language used by Lord Lyndhurst in the case of *Van Sandau* (1), when he said: "If this form of order had been used for the first time upon the present occasion, and there were no precedent to appeal to on the subject, I should have come to the conclusion that the order was insufficient." But this form of warrant having repeatedly been recognised as valid both by the courts in England (2), and by our own courts (3), I do not think that it would be right or proper to avoid deciding the important question of privilege which is

(1) 1 De Gex, p. 311.

(2) Case of the Sheriff of Middlesex, 11 A. & E. 273; Gosset v. Howard, 10 Q. B., 359 to 452; Parke, B., Obs.

(3) Ex parte Monk, 1817; Ex parte Tracy, Stuart's Rep. 478; Case of Brodeur, Journals, Leg. Assembly, Canada, 1854; Ex parte Lavoie, 5 L. C. Rep. 99.

raised in this case by adjudging upon a mere question of form and by deciding contrary to previous decisions, although I admit such a warrant to be liable to very grave objections.

The next question raised is that the Speaker had no authority to sign the warrant; that there was no order from the Legislative Assembly, the terms used being merely that the House moved, without saying that it had adopted a resolution or gave any order. This is a most technical objection, and to which the court is not disposed to give much weight. If the House unanimously moved that a certain thing be done it has certainly resolved that it should be done, and we think there is nothing in this objection (1).

The third and most important question raised is whether the Legislative Assembly had a right to summon a witness at the bar of the House or before a committee, and to commit him for refusal to appear. On the part of the petitioner it has been contended that the Local Parliaments were mere corporations, having no other powers than those expressly conferred upon them, and that they have no power to commit for contempt, nor even that of compelling witnesses to appear before them. They further contend that the Act of the Provincial Parliament of Quebec, 33 Vict. c. 5, giving to each House of Parliament authority to summon witnesses and to punish disobedience, was beyond the power of that Legislature, and that the Legislative Assembly had no such power as that claimed under that Act, which is unconstitutional. On the other side it was contended that we had no right to enquire into the constitutionality of an Act regularly passed and sanctioned, and that by the exercise of the power of disallowance alone could that Act be set aside. We cannot adopt this last view,

(1) Case of the Sheriff of Middlesex.

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and we consider that if an Act be clearly beyond the scope of the authority of the Parliament which passed it, whether that Parliament be the Dominion or a Local Parliament, it is our duty to determine, when the question is properly raised, whether that Act emanates from a proper and competent authority, otherwise we might come to have two Acts upon the same subject and contrary to each other, the one emanating from the Dominion and the other from the Local Parliament, in which case it would be absolutely necessary to determine which of those two Acts was law and emanated from the proper authority.

In their respective sphere the authority of the Dominion and that of Local Parliaments are co-extensive—that is, the one is not inferior nor subordinate to the other. All the powers which were formerly exercised by the several branches of the Legislature of the late Province of Canada have by the Confederation Act been transferred to either the Dominion or the Local Parliaments. I do not see that the power of Colonial Legislatures to summon witnesses in order to conduct the enquiries required for a proper understanding of the several questions affecting legislation or the administration of public affairs was ever challenged. Responsible Government, which has been recognised in the Local as well as in the constitution of the General Government, would be a delusion if that power of enquiry was denied, and the enquiry would be valueless without the power of summoning witnesses. I consider this to be a necessary incident of the powers of Legislatures, and of controlling the administration of public affairs and as such I believe that the House of Assembly had a right to exercise it, as it was exercised under the Constitution of the late Province of Lower Canada in the case of Mr. Monk, who was imprisoned in 1817 for refusing to produce certain

registers and papers before the House or a Committee of the House of Assembly. I cannot find a case where this power of Colonial Legislatures to summon witnesses has been questioned. I do not mean to say that our Local Legislatures are vested with all the privileges appertaining at common law by immemorial usage to the House of Commons in England. It has long been settled that they had not (1), but I merely say that they have a right to exercise such rights and privileges as are mere incidents of the powers specifically vested in them, and, without which they could not properly exercise the duties devolving upon them.

I find that in the United States, in the case of *Anderson* v. *Dunn* (2), the Supreme Court decided that the power to commit for contempt others than members of the Legislature, although not expressly given by statute, was a necessary incident of the powers of the Assembly. If as a necessary incident of the exercise of its functions, the Local Legislature had the right to summon witnesses and punish them for contempt in disobeying its orders, it had undoubtedly the authority to regulate a right it possessed without legislation; and therefore the Act of 1870, already mentioned, in so far as it provides for the summoning of witnesses, was within the scope of its authority, whatever may be said of some other portions of the same Act, and upon which it is not necessary to express any opinion in this case.

The majority of the Court is for quashing the writ of *habeas corpus* and for rejecting the petitioner's demand.

[*Translated.*]

TASCHEREAU, J.:—

I cannot conceal from myself the importance of this

(1) Kielly v. Carson, 4 Moore P. C. C. 88; Cuvillier v. Munro, 4 L. C. R. 146.

(2) 6 Wheaton, 204.

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case, and the necessity of a prompt decision on the part of this tribunal, on account of the public and private interests which are here in question.

Apart from a number of less important questions and objections which are raised against the petition, and the absence of affidavits on the part of the petitioner, which I do not think it my duty to notice, there are two chief questions, besides the one relating to the form of the warrant.

1. Has the Legislative Assembly of the Province of Quebec power to hold enquiries, to compel witnesses to appear before it and to give evidence on oath ?

2. If a witness fails to appear before the Legislative Assembly, has the Assembly the right to cause him to be committed to the custody of the Serjeant-at-Arms, to bring him to its bar, and, as a consequence, can it punish such refractory witness ?

A special enactment gives these powers to this Assembly; and these powers are besides necessary for the performance of its part in the legislation of the country

The Act 33 Vict. c. 5, ss. 2, 4, 5, 6, 7, 8 and 9, passed in 1870, confers on it these powers. This Act does not admit of any other construction. But the counsel for Mr. *Dansereau* asserts that this Act is unconstitutional, and that the Legislature has exceeded its powers in passing it. The strongest objection that might be made to the Act, at least from the point of view of the present case, is not that of unconstitutionality, but of inutility; for the Confederation Act, in giving to the Legislature of Quebec the power to make laws for the good of the country, to preserve and protect the immovable property of the Province, to change any part of the Constitution except what relates to the Lieutenant-Governor, by enacting that all the laws in force in the former Province of Lower Canada should be preserved to it in the same

manner as if the Act of Confederation had not been passed—the Act of Confederation, I say, in conferring all these powers on the Legislature of Quebec, has equally and implicitly intended to give it the means of accomplishing all that this Confederation Act allowed it to do and perform. Now, in order to legislate, it is necessary, in the majority of cases, to have an enquiry under oath —it is necessary to prove the fulfilment of conditions and formalities precedent, before granting or taking away charters or privileges, and invading the rights of the people of the country. It must have been foreseen that in the Legislative Assembly serious differences would arise among the members; that the dignity of the Assembly might be outraged, not only by the conduct of its members, but by that of the people outside, which would necessitate prompt and energetic action on the part of the deliberative body which was in session; and yet, on the principle that that Legislative Assembly should have only a limited jurisdiction, it could not enquire into these differences or these libels, and it would to the great injury of the public welfare, be obliged to suffer with patience the injury and shame of a libel without the power of making an investigation in order to expel the guilty member or to punish the person guilty of libel. A charge of shameless and open corruption against one of its members would remain unpunished, if the guilty person could not be reached by an enquiry under oath.

The cases where prompt and energetic action by the Assembly would be required, might be multiplied indefinitely, and yet people would go on repeating that the Legislative Assembly has only a limited power or jurisdiction; but the Act of 1869, 32 Vict. c. 6, allows the examination of witnesses under oath. Independently of that Act and of the Act of 1870, which confer expressly these powers on the branches of the Quebec Legislature

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they possess these powers *ex necessitate rei*, as corollaries of the other powers which the Act of Confederation gives, and no new legislation was necessary to give them. In defining them, the Legislature has virtually done nothing more than confirm and declare what belonged to it already by the usage of at least eighty years, and consequently since its establishment and existence as a Legislature. In 1831, at the time of the debates in the House of Lords in England—on the 13th of April, 1831, in reference to the arrest of the proprietor of the *Times* as guilty of libel, when some of the Lords denied the right of their House to punish by imprisonment a person guilty of libel, Lord Tenterden asserted, on the contrary, that this power was absolutely necessary to the Houses of Parliament in order to discharge their functions with dignity to themselves and advantage to the country. These words from the lips of Lord Tenterden, of whom England has so much reason to be proud as one of her greatest jurists, shew that the power claimed by the Legislative Assembly of Quebec is a power indispensably necessary, and without which it could not really exist.

We find in Story's Commentaries on the Constitution of the United States of America, page 307, the expression of a similar opinion. This author states that this power ought to be allowed to legislative bodies, and he cites the fourth volume of Blackstone's Commentaries, page 286, and ends by saying: "This power has not been disputed in any country, and has its origin in the very nature of every legislative body."

But it will still be said that the Legislative Assembly of Quebec is only one of the branches of a Legislature, with a power or jurisdiction which are limited. I am ready to admit that its powers are not those of the Imperial Legislature, nor even of the Legislature of Canada; but I say that, in its domain and its functions,

it has a power and a superintendence which is exceptional and superior to every other, and that it has duties and obligations to fulfil of such importance that it could not fulfil them lawfully and properly without the powers which the counsel for the petitioner denies to it. It, as much as the House of Lords or the House of Commons, may find itself in circumstances where the exercise of these powers is indispensable, unless it is to renounce its dignity and cease to legislate on the important subjects which are within its province, and which may demand despatch.

The Act of 1870 seems to me perfectly legal and constitutional. It, like all other Acts, has been enacted in the name of Her Majesty, and assented to, and no doubt it would have been disallowed at the outset, by the competent authority, on the advice of the Minister of Justice, if it had had any semblance of unconstitutionality. So long as this statute is not repealed or declared unconstitutional, I consider it as expressing the law of the Province, and I owe it full and entire obedience.

I might cite the case of *Tracy* and *Duvernay*, who, in 1832, were accused of libelling one of the Legislative Houses in the old Province of Quebec. Their case was argued before the Court of King's Bench at Quebec, on a *habeas corpus*, and among the different reasons advanced by the honourable judges who expressed their opinions we find fully stated those of the necessity of the branches of the Legislature having power to imprison for libel, as a means of protecting their rights and privileges.

The last objection is that the warrant is general and does not define the causes of the arrest of the petitioner. But it will be observed that this warrant is not a final process *(n'est pas en execution)*, but is only a summons, effective and rigorous it is true, to appear at the bar of

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the Legislative Assembly, which, in virtue of its power of sending for persons and papers (in virtue of the 33 Vict. c. 5, and at the same time of an inherent right and one indispensable to its existence) takes this accustomed mode of ensuring the presence of an important witness who is not willing to appear otherwise. It is not a final execution, it is a preparatory measure in order to summon him to the bar of the Assembly to answer an accusation.

Hereafter, if it becomes necessary to give an order for final imprisonment, it is probable that the prisoner will be able to plead the generality of the warrant of incarceration. At the present time his objection is premature.

The course followed by the Legislative Assembly is that followed with regard to the proprietor of the London *Times*, which I have already mentioned, and is that indicated in May's Parliamentary Practice, page 420. At first a simple command, in general terms, to bring this man before the House was proposed and seconded without objection, and when he had been placed at the bar he was convicted and condemned to imprisonment for contempt; and it was on the second motion that the debates took place, during which Lord Tenterden spoke and delivered a speech from which I have cited an extract above.

This summary procedure is virtually sanctioned by section 9 of 33 Vict. c. 5, which declares that "All breaches of the Act itself may be summarily investigated by the House against which they have been committed, in such manner and form as the House shall consider suitable."

The English precedents are to the same effect, that is to say, upholding a simple warrant without any statement of the reasons.

This is what has been done in the case of the petitioner.

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I am therefore of opinion that the writ of *habeas corpus* should be quashed, and that the petitioner should be remitted to the custody of the Serjeant-at-Arms of the Legislative Assembly of the Province of Quebec.

SANBORN, J.:—

The B. N. A. Act, 1867, was enacted in response to the petition of the late Provinces of Canada, Nova Scotia, and New Brunswick, as stated in the preamble of the Act, "to be federally united into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." The powers of legislation and representative government upon the principle of the British Constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been conceded to Canada, and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the Act of 1791 to 1840. The late Province of Lower Canada was constituted a separate Province by the Act of 1791, with a Governor, a Legislative Council and a Legislative Assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law, in civil matters. No powers that had been conceded were intended to be taken away by the B. N. A. Act of 1867, and none, in fact, were taken away, as it is not the wont of the British Government to withdraw constitutional franchises once conceded.

This Act, according to my understanding of it, distributed powers already existing, to be exercised within their prescribed limits, to different Legislatures constituting one central Legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the Provinces, or breaking the continuity of the prescriptive

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rights and traditions of the respective Provinces. In a certain sense the powers of the Federal Parliament were derived from the Provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The Provinces of Quebec and Ontario are, by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada.

This recognises their previous existence prior to the Union Act of 1840. All through the Act these Provinces are recognised as having a previous existence and a constitutional history, upon which the new fabric is based. Their laws remain unchanged, and the Constitution is preserved. The officers are the same in name and duties, except as to the office of Lieutenant-Governor, who is placed in the same relation to the Province of Quebec that the Governor-General sustained to the late Province of Canada.

I think it would be a great mistake to ignore the past governmental powers conferred upon, and exercised in, the Province now called Quebec, in determining the nature and privileges of the Legislative Assembly of this Province. The remark is as common as it is erroneous, that the Legislatures of the Provinces are mere large municipal corporations. It is true that every Government is a corporation, but every municipal corporation is not a Government. Consider the powers given exclusively to Provincial Legislatures. They have sole jurisdiction over education, property and civil rights, the administration of justice, and municipal institutions in the Province, subjects which affect vitally the welfare of society. The very court which enables us to determine the matter now under consideration, holds its existence by the will of the Provincial Legislature. No such powers were ever conferred upon mere municipalities in their ordinary sense. They are subjects which in all nations are entrusted to

the highest legislative power. Legislatures make laws; municipal corporations make by-laws. If these legislative powers confided to Provincial Legislatures are not to be exercised in all their amplitude, with the incidents attaching to them, they can be exercised by no other sovereign power, while our present Constitution exists. They have been conceded by the Imperial Parliament, and it claims no further right, as a rule, to legislate upon our local affairs, and the powers given exclusively to the Local Legislature necessarily exclude the jurisdiction of the Federal Legislature. Blackstone says: "By sovereign power is meant the making of laws; for wheresoever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the Government may put on. For it is at any time in the option of the Legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases, by constituting one or a few or many executive magistrates, and all powers of the State must obey the legislative power in the discharge of their several functions, or the Constitution is at an end."

When I find, after specifying several subjects over which the Local Legislatures have jurisdiction, there is added generally "all matters of a merely local and private nature in the Province," I find no other limit to these powers than the territorial boundary of the Province, and the class of subjects by which their powers are circumscribed. I find it equally difficult to assign any other limit to the power expressly given to amend the Constitution of the Province than that expressed in the Act. They are not permitted to amend the Constitution as respects the office of Lieutenant-Governor. I find in section 65 of the B. N. A. Act, the powers and functions of the Lieutenant-Governor are specially defined. This establishes that, in the view of

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the framers of that Act, the powers and functions of this branch of Parliament form part of the Constitution, and consequently the powers of the other branches are equally a part of the Constitution; and ability to amend the Constitution as respects the House of the Legislature includes power to determine their respective functions and immunities.

The right of disallowance by the Governor-General of local Acts within one year is a check which may be exercised to prevent impolitic laws coming into force. Where this right is not exercised, and there appears nothing *ultra vires* in the legislation, I see no reason why the Act 33 Vict. c. 5, of the Province of Quebec, should not be considered a law of the land. The counsel resisting this petition for enlargement has contended that upon a question of this nature the courts cannot declare a statute of the Provincial Parliament inoperative which has not yet been disallowed. So long as we have no general Court of Appeal, the ordinary courts must decide what is law when a conflict of jurisdiction is claimed to exist.

There is, no doubt, an incongruity in a court's deciding upon the powers of a Legislature to which it owes its existence. That power was contemplated being placed in a Supreme Court created by the Parliament of the Dominion; but so long as no such court has been created, it seems that the ordinary courts are under the necessity of declaring an Act *ultra vires* when they find it to be so. In this instance this is not a practical question, for there does not appear to be any want of jurisdiction in the Provincial Parliament to pass the Act complained of. By the second section of the Provincial Act mentioned, the Legislative Assembly of the Province of Quebec is permitted to command and compel the attendance or production before such House, or any committee thereof,

of such papers and things as it may deem necessary for any of its proceedings or deliberations. This is precisely the power exercised in the case before us. This arrest of Mr. *Dansereau*, by virtue of the power conferred by this Act, is, apart from the question of privilege, an inherent in, and incident to, every legislative body. Such privilege is exercised by one House upon an undefined law based upon the nature and usages of legislative bodies. This is by a statute conferring the right passed by the three branches. I hold that under this statute the Legislative Assembly of the Province of Quebec has a right to compel the attendance of Mr. *Dansereau* before the bar of their House.

Thus holding, it is unnecessary for the purpose of this case to discuss the question of privilege as a common law right. This, however, is not a matter which this Court can dismiss in justice to the subject, without some observations upon the general privileges and powers which the Provincial Legislative Assembly has a right to claim. From what has already been said, it is unnecessary to remark that I consider that the present Legislative Council and Legislative Assembly of Quebec have a right to invoke the usages and precedents of these Houses existing prior to the B. N. A. Act of 1867, from 1791 to the date of that Act. If anything further need be urged than what has been said, there is the notable precedent of the British Parliament, dating their privileges prior to the Commonwealth, and the fact that the Commons, subsequent to the Commonwealth, did not insist upon the right to examine witnesses on oath, as one of their privileges, which was insisted upon by that body during the Commonwealth. (May, p.427.) Whatever powers and immunities attached to the Legislative Assembly of the late Province of Lower Canada and the Legislative Assembly of the late Province of Canada, as neces-

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sarily incident to them in the proper exercise of their functions as legislative bodies, I consider attach to the Legislative Assembly of the present Province of Quebec. In considering the privileges necessarily incident to Colonial Legislatures, we can only apply the Constitution of the Parliament of the United Kingdom, where the analogy obtains. The Senate of the Dominion, or the Legislative Council of the Province, cannot claim the judicial powers of the House of Lords, and yet there are many judicial powers to be exercised in connection with legislation, the depository of which must be somewhere. For example, jurisdiction over divorce is given to the Federal Parliament. It has been thought necessary to assume power to examine witnesses upon oath, and determine the matter judicially, though neither House had greater powers than the Commons House of the United Kingdom. It became a necessary incident to the powers conferred. The Legislative Assembly of our Province has not the mere nude power of legislation. It has, by implication, by usage, and by a Constitution modelled upon the English House of Commons, also an inquisitorial power to make itself acquainted, by means of committees, [with] the needs of the Province, and the evils that exist in society over which it has control, in order to legislate intelligently and administer wisely. The appointment of committees of enquiry for purposes of this nature is incident to the existence and proper working of every legislative body. It is associated with all our ideas of legislation under the British system, and has been exercised without question in all our Parliamentary history as a Province. It has been urged at the bar that this inquisitorial power should be exercised by Royal Commissions, not by Committees of Parliament. Royal Commissions, strictly such, have been asserted by eminent jurists to be unconstitutional, as contrary to

Magna Charta. Lord Coke declares this most emphatically, inasmuch as the King cannot create a court to be administered upon any other rules than the common law. To constitute a court there must be *actor, reus, et judex.* Simple Royal Commissions, without the aid of statutory powers, are far more powerless than Parliamentary Committees. They have no power to compel the attendance of witnesses or the production of papers, or to examine witnesses under oath. Nor can they commit for contempt.

Since, however, the responsibility of Ministers has been better defined, these Commissions, which are now generally statutory, have been found of great use, but not by any means to supplant parliamentary committees. Judicial functions are now assumed by the House of Commons only as incidentally necessary to carry out their powers, notably in case of private bills and matters of election. May says, "The two Houses, in the course of centuries, have appropriated to themselves different kinds of judicature." The Grenville Act, providing a court in the Commons for the trial of contested elections, is said by Mr. Christian to have conferred immortal honour upon its author. The power to compel the attendance of witnesses, and to compel them to give evidence, it must be remarked, is distinct from the power to administer oaths to such witnesses. Where it has been found necessary to get evidence under sanction of an oath, devices have been adopted to have the witnesses sworn before a judge, or at the bar of the Lords and the like. (May, 427 and 408). It has not been considered essential to the discovery of truth, that witnesses giving evidence before the Commons House or a Committee should be sworn. (May, 427.) Any person who refuses to attend, upon the summons of the Legislative Assembly, to give evidence, is obstructing that body in the legitimate execution of its functions.

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I think, without reference to the statute referred to, there must be an inherent right in the Legislative Assembly to compel persons to attend before them and give evidence. This principle, it appears to me, is conceded in the cases of *Kielly* v. *Carson* and *Doyle* v. *Falconer*. In the former, Baron Parke said, "We feel no doubt that such Assembly has the right of protecting itself from all impediments to the due course of its proceedings. To the full extent of every measure which it may be really necessary to adopt, to secure free exercise of their legislative functions, they are justified in acting upon the principle of the common law."

This was said with reference to a Legislative Assembly acting under a Crown charter in a minor Province, and assuredly it should apply with much greater force to this Province, which, for many years, has been governed under a statutory Constitution and upon usages conformable to the British Constitution. The cases of *Tracy, Monk* and *Duvernay* in our early jurisprudence, and the recent case *ex parte Lavoie*, sanction these privileges as inherent in our Provincial Legislative Council and Legislative Assembly, and I find them recognised in the late cases in the Privy Council; and I see no reason, in this advanced stage of our parliamentary history and progress in all the material interests which give to a nation importance, why these powers should be denied to our Local Legislature. It must be borne in mind that the immemorial privileges of Parliament date back to a period in history when the British Parliament and British nation were very different from what they are now. The state of affairs then may be gathered from a curious contract, cited in Glanvill's Reports, in the time of Edward IV., 1463, in which John Strange, the member for Dunwich, covenants with his electors "that whether

the Parliament hold long time or short, or whether it fortune to be prorogued, he will take for his wages only a cade and half-barrel of herrings, to be delivered by Christmas."

The men of England have been vigilant to prevent anything adverse to the common weal getting the sanction of immemorial usage, and the privileges of Parliament, claimed from this usage, have this usage because of their inherent necessity in the governing power. It was well remarked by one of the counsel for the Legislative Assembly, that if we cannot claim the privileges by immemorial usage, we can and ought to have such as are necessary to maintain the dignity and efficiency of our Legislature from the nature and importance of the powers conferred upon them. This warrant discloses no contempt. It is simply an exercise of the power of the Legislative Assembly to bring Mr. *Dansereau* before that body. If this warrant were issued solely on the ground of privilege, it would be difficult to sanction it in its vague terms, without the purpose being shewn; but by the second and ninth sections of 33 Vict. c. 5, such warrant is permissible, for the House is permitted to bring any person before it, and to adopt such form as it may deem proper. I think the arbitrary form of the order is objectionable, but I cannot say that it is illegal.

With regard to the decision of Mr. Justice Ramsay in the case of *Cotte*, while it evinces great research and is an able opinion from the stand-point from which he views the subject, for the reasons given I am unable to agree with him in the views he has expressed as to the status and powers of our Colonial Legislatures. In his dissent from the majority of the court to-day he has given additional evidence of his research and his familiarity with this subject. He has done me the honour to refer to a speech made by me in

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the late Legislative Council of Canada, when the project of the Constitution to be adopted for the Confederated Provinces was under discussion. The sentiments there expressed, I understand, are cited as apparently inconsistent with the opinion I give now and here. This is not a place for discussion, but of opinion, but I think if my learned brother applies the logical mind which he is known to possess more carefully to the consideration of the sentiments there expressed, he will see no inconsistency between the views there expressed and the opinion now given. The argument then was that of a legislator, deprecating placing large powers in Local Legislatures without guarantees to secure the rights of property. As a fact, the powers were granted without guarantees, and it now only remains loyally to concede to these Legislatures the incidents which are corollary of the large powers conferred. I think the *habeas corpus* should be quashed, and the Serjeant-at-Arms be left to execute his warrant.

MONK, J.:—

I concur in the judgment of the Court, and on the main points in what has fallen from my learned colleagues. Before proceeding to examine the merits of this important case, it may be proper to remark that two technical points of some importance were raised by the opposing counsel at the argument:

1. It was contended by Mr. *Ritchie*, on the part of the Speaker, that the writ of *habeas corpus* had issued improvidently and should be quashed. It was argued that the 20th sec. of cap. 95 (Con. Stat.) would seem to require an affidavit; in fact, a *prima facie* case to be first made out, upon which, and upon which alone, the judge was called upon to exercise his discretion before the writ was allowed to issue. In the present case, this requirement

was not observed; and finally, it was urged that the writ had been erroneously issued on sec. 4 of the same statute.

2. It was, on the other hand, contended by Mr. *Kerr*, on behalf of the petitioner *Dansereau*, that the Speaker's warrant was a general warrant, and did not disclose any offence or delinquency whatever, nor any cause or apparent justification for Mr. *Dansereau's* arrest; and, consequently, that it was absolutely null and void, or, at all events, contrary to law.

These points have received from the Court the serious consideration which they undoubtedly deserve, and after what has been stated by my learned colleagues, I would merely remark on the first of these objections that, as a matter of fact and of regular procedure, the writ in this case did issue on the 20th sec. cap. 95, of the Con. Stat., and not sec. 4 of the same statute. (See *Hobhouse's Case.*) I apprehend that sec. 20 does not require a case to be shewn, by affidavit or otherwise, upon which the discretion of the judges is to be exercised. No such formality was exacted or observed in the present instance, and I doubt whether the mere exhibition of a general warrant, such as was produced in the case under consideration, was precisely what the law contemplated. In instances of this kind, not being of a criminal character, the affidavit of the petitioner, disclosing the chief circumstances of the case, if not of absolute necessity, would have met and answered in a manner more satisfactory, the requirements by the statute, and been more in conformity with the practice which has prevailed in this district—a practice which I regard as in the highest degree proper and judicious—such an affidavit of what was the cause of the arrest, or that there was no legal ground for it. It ought to have rebutted the presumption that the cause of arrest was legal.

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Although I consider it would have been desirable, and certainly more regular, if these formalities had been observed, yet I would not go the length of holding that the writ was improvidently issued, and that it should, therefore, be quashed. I would add, moreover, that notice of the application seems to have been given, that a copy of the warrant was produced before the learned judge, and that no objection appears to have been taken to the issue of the writ on that ground. I would, therefore, overrule this pretension of the counsel for the Speaker.

Upon the second objection, it was urged by Mr. *Kerr* that the warrant being a general warrant, and disclosing no ground or reason for arrest whatever, is irregular, and cannot be maintained by this court. No doubt, it may be said, and it has been ably and strenuously argued by Mr. *Dansereau's* counsel, that the Speaker's warrant should, at least specifically, or in general terms, shew some reason for the petitioner's arrest. Was Mr. *Dansereau* to be taken into custody by the Serjeant-at-Arms, and brought before the bar of the House, for breach of privilege, contempt, or refusing merely to obey the summons of a committee to appear and give evidence? The warrant does not say either in general or specific terms.

Without denying that there is considerable, indeed much, force in this argument, yet I am unable to accede to this view of the matter. I know of no precedent, law or usage which would justify this court in quashing a general warrant issued by the Speaker of the Legislative Assembly in a case like the present. This is, if I am not mistaken, the form of warrant issued by the Speaker of the House of Commons in England in cases similar or analogous to this. (See *Stockdale* v. *Hansard*; May on the Law, Privileges

and Usages of Parliament, p. 172; the case of the *Sheriff of Middlesex* (1), and the cases there cited; *Burdett* v. *Abbott* (2), *Howard* v. *Gosset* (3).) Warrants in this form have been issued by the Provincial Legislature for nearly 100 years, and finally, if the local Act of 33 Vict. c. 5, be part of the law of the land and binding on us, which I hold it is, the 9th section of that statute is decisive, and disposes of the question in terms the most peremptory and explicit

By that clause the house is constituted the exclusive judge of its own modes and forms of proceeding, and I am not disposed to interfere. In a case of doubt, it is a dangerous and delicate course for a court of law to set aside the preliminary proceedings of the Legislature in a matter such as this. I would merely remark that, technically speaking, a warrant of commitment is something different, on which, if a party be imprisoned for an illegal cause, he can have his remedy. For these reasons I would not set aside the warrant of the Speaker. I would not disregard it and liberate the petitioner on that ground.

These two technical objections (no doubt serious, but, as I apprehend, not fatal objections) having been thus overruled, I come now to consider what are the power, authority and privileges of the House of Assembly of Quebec, as I view them, in cases of the kind submitted for our consideration. We have to determine whether, from necessity as an inherent prerogative, an indispensable incident of their legislative authority, from long and recognised usage, or from positive law, they are or are not such as the house claims in the present case.

My learned colleagues have so fully and so ably expressed their opinion and explained the grounds of our judgment, that it is, perhaps, not necessary for me to

(1) 11 A. & E. 273 (2) 14 East, 1. (3) 10 Q. B. 359.

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offer any very extended observations on this subject; but since one of my learned colleagues, dissenting from our decision, has, with great learning and marked ability, extended his critical examination of the questions involved over a wide range of history, jurisprudence and constitutional law, it may be expedient that I should state briefly my reasons for coming to the conclusion that our Local House of Assembly does, beyond all doubt, possess the right to summon any of the Queen's subjects in this Province to appear before it or its committee to give evidence, and for other objects; and that if these persons disobey, or disregard such summons, the House has the power to compel their appearance before the bar of the Assembly, to be dealt with according to law, and the rules and resolutions of that body.

I shall for the sake of convenience first offer a few remarks upon the powers, privileges and functions which, as it seems to me, at all times since the first granting of a Legislature to the colony, have been, and which now necessarily must be, inherent in that body, independent of any precedent or any usage. It was not contended by the counsel for the Speaker that the Legislative Assembly of Quebec possesses all the powers and privileges of the Imperial House of Commons. It is a legislative body, no doubt, but subordinate to that of the Parliament of Great Britain, and subject to its control, if it chose to exercise it. Therefore, such a pretension would perhaps be inadmissible. I do not consider myself bound, in the present instance, to decide that question; it is not at all necessary that I should do so. Vague or cogent analogies may exist between the two bodies; but I do not in any way or in the least degree, rest my opinion on these assumed or apparent analogies. They may be referred to, or even invoked, in order to illustrate matters of history and

parliamentary usage, but not as being of material importance in deciding this case.

For example,—the peculiar powers, laws and usages of the British House of Commons are numerous and extensive, and are now, moreover, pretty well defined —they are, and always have been, I presume, deemed to be inherent, indispensable—in fact, absolutely necessary for the unmolested and efficient exercise of its authority and functions as a legislative body. Upon no other grounds and for no other reasons, could they have existed, or would they have been tolerated by the British people. Whether those powers, laws and privileges, peculiar to the House of Commons, have been the slow growth, the progressive accumulation during the lapse of many centuries arising out of critical emergencies in the development of the British Constitution, or whether they actually originated in the violence and political struggles of the 12th and 13th centuries, are, I presume, questions which I am not called upon to decide · and which it is not expedient to discuss on the present occasion. The precise time at which the memory of man is supposed to halt, or to lose its way, need not be determined by us. One thing is clear, and it is notoriously a matter of fact, that these powers and privileges of the Imperial House of Commons are implied in the very existence of that body, and that they result and have resulted from necessity, or as some would say from convenience (pretty much the same thing in matters of this kind); but time, with its varying and contradictory usages and precedents, is not an essential ingredient here, except in so far as it may have developed, and given strength and expansion to certain usages, and to that necessity and convenience or expediency, as my learned colleague on my right, dissenting from the judgment of the Court, has emphatically termed it.

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Among these usages, laws, rules or implied powers of the Imperial Parliament is to be found one which has existed and been exercised by the British House of Commons for ages, and through all the anarchy and violence of many revolutions, and that is the undoubted authority to compel parties, by general warrants, to appear before the bar of the House to answer for neglect or disobedience, or for certain objects not contrary to the laws of the land, but recognised and to be investigated and enforced, perhaps punished, by the laws and custom of Parliament, and which is indispensable for the efficient and responsible exercise of its functions. This has been an ancient and undisputed prerogative, and that is all, in this connection, which as an illustration arises for our consideration in the present instance.

Now, the same kind of necessity and implied authority, in this respect, though in a subordinate degree, appertains to and is vested in the Legislative Assembly of Quebec, as in the Imperial House of Commons. This I think, is beyond controversy, and I am not disposed to ignore or criticize those powers as they are claimed and enforced in England; and unless our law is clear, decisive and peremptory, I will not and cannot impede or overrule their exercise by our own Legislature.

I am unhesitatingly of opinion that this power, authority or prerogative, or whatever it may be termed, or whatever designation it may receive, is absolutely, indispensably necessary here, in order to carry on and accomplish the legislation of the country; and, at the same time, for the purpose of exerting a vigilant supervision over the Executive Government in the execution of the authority confided to it, and in the performance of its duties towards the people, represented by the House of Assembly. It has been found so in England, where the highest political wisdom has been ma-

tured by long experience; and in fact, in all representative bodies exercising the double functions of legislation, and at the same time called upon to exert a jealous, constitutional control over the executive power of the State, these powers are inherent and essential. And this is more particularly true in regard to legislative bodies framed on the model and vested with the authority of the British House of Commons. A considerable portion of our own legislation, in order to be judicious and well considered, must be preceded by enquiry, and for this purpose Parliament must have the power—the effective power—of making such investigation.

Besides, and further still, not to enumerate a great number and variety of cases, where the Legislature must possess power inherent and indispensable in its very constitution, not only for the purpose of exercising its ordinary functions, but also for the purpose of maintaining its own dignity and the respect of the country,—if it does not possess the power of compelling the attendance of witnesses, and the production of documents and other written testimony, what, under our system of ministerial responsibility to Parliament, is to become of that control and responsibility? Is all this a sham, and an abject delusion? What is to be done with Ministers, as we call them, who may, from culpable carelessness, or from design, have become guilty of some serious delinquency, but cognizable by Parliament only? How are we to deal with Ministries or individual Ministers? How is Parliament to enquire into the management or the mismanagement of the Departments of Government? What, in short, is to be done by Parliament in this respect, if it be declared incompetent to make enquiries, or to compel the attendance of witnesses; if it be helpless, and is forced to act blindfold in all these matters? If this be the case, let the Constitution be

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changed, and let it be declared that our Legislature and our Government constitute and are vested with the powers of a municipality, and no more. But if our Legislature is a British Legislature in the proper sense and meaning of the term, enacting laws for British subjects, though subordinate, and since, as a matter of fact it is so; and if our Government is framed, in so far as circumstances will permit, upon the model of the British Constitution, and inasmuch as it is so, the British Parliament, in conferring on us such a Legislature and such a Constitution, did impliedly and necessarily bestow on them, and vest in them, the power and the adequate authority of accomplishing and completely fulfilling the objects for which they were intended. *Qui veut la fin, veut les moyens*, may be a small maxim, but it is a true and pregnant one, and it is a principle of the common law, that where political or other such bodies are organized and powers granted, all the means and authority necessary for the exercise of their functions are also impliedly conferred, though not expressly mentioned.

A single illustration will, I think, render all this pretty obvious. In 1870, the Local Legislature passed an Act, 33 Vict. c. 5, by which witnesses examined before Select Committees of the House must or could be sworn; their evidence is now given under oath. This statute is a part of the law of the land—its binding force no one, I believe, seriously disputes; but whether they do or no, for us sitting here in this case it is a part of the law of the land, or rather and more especially a law of Parliament. The right of summoning is here implied, and if persons refuse, the power of compelling their attendance is necessary, I presume. If so, they must, I apprehend, be first brought before the House. If the House does not possess this power, the

statute would be a dead letter, and to most practical interests and purposes inoperative.

From all this, therefore, it seems plain to my mind that the House does possess from necessity, and by implied and inherent prerogative, independent of usage or precedent, the powers claimed in the present instance. But if we hesitate in regard to this view of the subject, does there not exist a usage—a jurisprudence, so to speak—in matters relating to the powers of the Local Parliament of Quebec, which must go far to remove all doubt in reference to these powers, as claimed in the present instance? Is there no evidence of an authority, long exercised by our Parliament, and which may, at least, assist us in coming to a safe conclusion in a case like the present? I think we have precedents and decisions of considerable value and importance in this matter; and in invoking these precedents and these decisions, I do so to corroborate the view of the case which I have just presented. They do not, I apprehend, contradict, or in any way invalidate, but they confirm the soundness of the argument based on implied and necessary power; and furnish proof, if such were wanting, of the existence for nearly a century of the law, usage or authority here contended for.

And, first, I would remark that we need not, we cannot go back to the middle ages, exploring and searching for a *lex et consuetudo Parliamenti*. We are not called upon to revert to the times and events beyond which the memory of man runneth not, and knoweth nothing to the contrary. These are pleasing, perhaps instructive speculations, but, according to my view of this case, they lie outside and beyond the enquiries we are called upon to make. In the United States, they date the laws and usages of Congress from the formation of their Constitution, and we may safely, and must from

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necessity, trace ours from the organization of our Government under the British Crown to the present day. Our constitutional retrospect, if I may so express it, is not so extensive, our horizon not so distant; but, at the same time, they are not so hazy or historical as they are in England. We go back scarcely a century, but even within that short period we find the laws, usages and powers of our Parliament constantly and decisively asserted. We have the case of Mr. *Young* in 1793, that of Mr. *Monk* in 1817, those of Messrs. *Tracey* and *Duvernay* in 1832, of *Brodeur* and *Lavoie* in later times. These persons were brought before the bar of the House on general warrants—some for breach of privilege, some for refusing to give evidence and to produce documents, some for libels on the House, and others for delinquencies cognizable by Parliament. In the recent or pending case of the Tanneries Exchange, or Swap, as it is popularly called, witnesses have been summoned and sworn, and reluctantly gave evidence.

There are more and many other instances, not necessary to mention here, in which this inherent and necessary power of Parliament has been repeatedly exercised. Some of these cases were questioned—were brought before judicial authority—but the course and proceedings of Parliament were sustained, or at least have never been overruled. All this looks very much like a *lex et consuetudo Parliamenti*. If they do not establish that, they establish nothing; and in so far as usage is involved to justify these proceedings, we are driven to the conclusion that all the compulsory investigations and enquiries- all the instances of arrest and restraint conducted and enforced for nearly a century, were simply acts of tyranny, usurpation of authority, and, moreover, flagrant violations of law on the part of our Parliament. I should not like so to decide. I have no warrant, no authority for doing so.

It has been repeatedly said, and argued with great earnestness, that there have been three separate, fundamental and distinct breaches in the continuity, so to speak, of our Constitution—one in 1838, one in 1841, and the last in 1867. So likewise, though not in the same form, nor under the same circumstances, have there been disturbances, disruptions—I may say breaches in the British Constitution. Yet antiquarian industry, the legal researches of constitutional lawyers, in pursuit of precedents and parliamentary law, cheerfully travel back over this mutilated Constitution to the 13th century, and even to an earlier period.

Without, however, pursuing this analogy further, or into greater detail, as a matter of fact our Constitution has undergone suspensions, changes, modifications, and withal occasional restorations, and I think it may be safely held that if these parliamentary powers, usages and privileges ever did exist, and since they did exist, they never were, by these vicissitudes in our constitutional history, modified or abrogated; and, inasmuch as the Confederation Act, in this respect at least, has left us where we were—that is, independent, supreme, within our own sphere of legislation—it cannot be said to have interfered with these laws and usages of Parliament such as they existed in 1867.

Thus, then, as I view this part of the case before us, the authority and inherent privileges of the House of Assembly have virtually continued, though occasionally in abeyance, through all the changes of our Constitution, and they exist now in as full force as they did for a long time, and immediately previous to Confederation. I consider myself, therefore, bound by what I regard as an established usage, and I cannot in the face of all this decide that for nearly a century, and up to the present day, the Legislature of this country has, in the instances adverted to,

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and which in part illustrate its history, been acting as a mob, perpetrating illegal acts, and guilty of flagrant tyranny and violations of the law of the land. Such an assumption on my part, in view of the arguments from necessity and usage, above set forth, would not only be inadmissible, but, at the same time, it would be simply a preposterous judgment.

It is unnecessary to refer at length on the present occasion to the decisions of the highest tribunals of England, or to the opinions of eminent judges in their courts, in order to shew that the view here taken as to the inherent authority of Parliament, and the force of parliamentary precedent and usage, even in subordinate Legislatures such as ours, have been fully sustained. None of these cases, it is true, are exactly in point, but the principles there laid down clearly shew that our decision in this case, upholding the power and authority of the Local Legislature, is in entire conformity with what has been there laid down as law.

I have been induced to go more fully into the above considerations than I deem at all necessary in order to dispose of the questions submitted for our consideration, in consequence of the dissent of my honourable and learned colleague on my right, who rests that dissent upon grounds which this court regard as untenable. But it is not essential that these questions should be raised at all. We have a positive law, a statute of the Local Legislature, the 33 Vict. c. 5, which disposes at once of this case. The 2nd and 9th sections of that Act are decisive.

It is and has been, however, argued that that statute is unconstitutional. I do not think so. I am free to admit that, under the rulings of our courts, where a local statute is in palpable and flagrant contradiction to the Confederation Act, or in conflict with an Act of

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the Dominion Legislature, the judicial authority of the local tribunals is bound to declare such a law unconstitutional and inoperative. If, however, there exist a doubt, that doubt must be given in favour of the constitutionality of the law, and the statute should be enforced. In this case, I apprehend, there is neither a manifest conflict, nor can a doubt arise. I am clearly of opinion that our Legislature had the power to pass that law. It has not been disallowed—it has been in force for five years, and we are bound by it; and being so bound, we need not appeal to any other authority or laws in order to decide this matter.

Thus, therefore, as it appears to me, upon the three grounds above adverted to—1st, the inherent and necessary powers of our Local Legislature; 2nd, the usage, precedents and decisions, in relation to the powers of our Legislature for nearly one hundred years; and partly under and in virtue of the clear and peremptory authority and requirements of positive laws, the 33 Vict. c. 5, and the statute of the same year which authorizes the administration of oaths to witnesses examined before committees of the House—we are bound to quash this writ of *Habeas corpus*, and to uphold, in so far as this case involves the prerogatives of our Parliament, the authority of the House. My learned colleagues, concurring in the judgment now rendered, have so fully and, I may add, so lucidly enunciated the views of the Court, that any further observations on my part would only weaken their elaborate exposition of the positive law which we regard as decisive of this case.

The judgment is recorded in these words:

"The Court having heard counsel on behalf of the petitioner and of the Speaker of the Legislative Assem-

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bly, and examined the petition, writ of *habeas corpus* and return thereto, doth quash the said writ of *habeas corpus*."(1)

Writ quashed.

[This note contains the judgment delivered by Mr. Justice Ramsay in Chambers in *Cotte's Case*, referred to at pp. 165, 167 *ante*, and is printed from the report in 20 L. C. Jurist, 210.]

RAMSAY, J. :—

On Friday a petition was presented to me in chambers on the part of Honoré Cotté, setting forth that he had been arrested and was then in custody of the Serjeant-at-Arms of the Legislative Assembly for the Province of Quebec, under authority of a warrant issued by the Speaker of that Assembly, and praying that a writ of *habeas corpus* might issue in order that the legality of his detention might be enquired into.

This petition was accompanied by a copy of the Speaker's warrant, authenticated by the Serjeant-at-Arms. The warrant was to the following effect :—

To the Serjeant-at-Arms attending the Legislative Assembly :—

Whereas the Legislative Assembly have this day ordered that Honoré Cotté, of the city of Montreal, cashier of La Banque Jacques Cartier, be sent for in custody of the Serjeant-at-Arms attending the House.

(1) [In *Landers* v. *Woodworth* (2 Can. S. C. R. 158), decided in January, 1878, it was held by the Supreme Court of Canada that the Legislative Assembly of the Province of Nova Scotia had, in the absence of express legislation on the subject, no power to remove one of its members for contempt, unless he was actually obstructing the business of the House ; and that a member having been removed from his seat, not because he was obstructing the business of the House, but because he would not make an apology which the House had required him to make, his removal was beyond the legal authority of the Assembly. In giving judgment, Richards, C.J., said, p. 192 :—"The Legislatures of Ontario and Quebec seem to have conferred on the House of Assembly in these Provinces extensive powers to enable them effectively to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The Legislatures of the other Provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power which it is desirable they should possess."]

These are, therefore, to require you to take into your custody the body of the said Honoré Cotté, and bring him to the bar of the said Legislative Assembly.

Given under my hand and seal at the city of Quebec this third day of February, one thousand eight hundred and seventy five.

(Signed) J. G. BLANCHET,
Speaker of the Legislative Assembly.

As the warrant did not set up a felony, or shew that the petitioner was in custody in execution of a sentence of a court of justice, I ordered the writ to issue forthwith.

At the argument, the learned counsel who appeared for the Speaker considered himself authorized, from the fact of the writ issuing before any argument, to draw the inference that I considered the warrant bad.

The production of a warrant plainly bad on the face of it would, it seems to me, be a sufficient reason in any case to use all expedition in issuing the writ of *habeas corpus*, even if the law was silent on the subject But the terms of the law are imperative, and the judge, in the vacation and out of term, has no discretion to exercise. The writ must issue on view of the copy of the warrant, unless the prisoner be detained for felony or treason plainly expressed in the warrant of commitment, or that, being convicted, he is in execution by legal process: Con. Stat. L. C., c. 95, s. 4. "And if any judge of the said Court of Queen's Bench or Superior Court, in the vacation time, and upon view of the copy or copies of the warrant of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, denies any *habeas corpus* by this Act required to be granted (being moved for as aforesaid), every such judge shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds sterling" *Ib.*, s. 18. Section 20 of Habeas Corpus Act, to which reference was made, applies to the *habeas corpus ad subjiciendum* in civil matters, and not at all to the case before me.

This question has really never suffered any difficulty. In the case of *Larue* (1), which was a commitment on a warrant of the Speaker of the Legislative Assembly, the argument took place on the return to the writ. It is true that a practice has prevailed here of taking the argument on the presentation of the petition, and probably no great inconvenience arises in ordinary cases by following this short-hand process; but in cases of an important character it should be avoided.

As a practical question, those who oppose the present petition have no ground to complain, for, though not necessary, notice was given of the presentation of the petition in this case, and the argument was, by consent of all parties, deferred to Saturday.

The return to the writ which has now been produced, sets up the Speaker's warrant as a justification of the arrest, exactly in the terms of the copy accompanying the petition.

On view of this return, it appears to me that I am called upon to decide two questions: Has the Legislative Assembly of the Province of Quebec the power to order the arrest of any one for contempt? and if so, has it exercised that authority in a lawful manner in the present case?

(1) 5 L. C. R., 99.

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If the Legislature possesses the power claimed, it must be either under the operation of the common law, or in virtue of some statute.

At the argument, the general principle that all the privileges of the Houses of Parliament in England were inherently possessed by the Houses of the Colonial Legislature was not contended for. Indeed such a pretension could not now be maintained. It is true that this doctrine was laid down in 1833 in *Beaumont* v. *Barrett* (1), but this case was overruled in *Kielley* v. *Carson* (2), in *Fenton* v. *Hampton* (3), and in *Doyle* v. *Falconer* (4).

These decisions are not only of the highest authority, as proceeding from the Privy Council, but they are supported by the strongest considerations. Without setting aside *Magna Charta*, it would be impossible by analogy to extend the right to attach any subject of Her Majesty without the authority of Parliament.

No new writ and no new commission, Coke tells us, can be created without such authority (2nd Inst., p. 478). The right to deprive a man of his liberty can only be exercised by law; and by this is understood the positive law of the land, and not a constructive extension of jurisdiction. Besides, it is a mere fallacy to build an argument on analogy. As was correctly remarked by Mr. *Ritchie*, one of the reasons given for attributing the power to commit to the House of Commons in England, namely, that it is a Court of Record, is absurd. With the exception of the power to deal with questions relating to the return of its members—now almost abolished—the House of Commons has no judicial functions at all, and never had as a body separate from the House of Lords. The real ground of the right there, is immemorial usage; perhaps founded on the fact that in early times the House of Commons had judicial functions as part of the High Court of Parliament.

But it was said that there was a similar usage in Canada, maintained by a continuous jurisprudence. In support of this assertion, my attention has been directed to Mr. *Monk's Case*, in 1817 (S. R., p. 120), and the cases of *Tracy* and *Duvernay* in 1832 (S. R., p. 478). To which might have been added the case of *Lavoie* (5), in which the learned judge expressed views incompatible with the decision in the case of *Kielley* v. *Carson* (2) decided fourteen years before. In 1818, in reference to the commitment of Mr. *Monk*, a special committee was appointed to examine precedents of such commitments. The committee enquired not only into the practice in England, but also that of Canada and of the other dependencies of the Crown. They cited two cases of attachment, one of their own Assembly as far back as 1793, for the arrest of Mr. *Young*, a member of the House, and another of the Legislature of Jamaica. In this latter case the Legislative Assembly of that island attached the person of Major-General Carmichael, the officer in command of Her Majesty's forces there, and brought him to the bar of the House, to give evidence as to the proceedings before a court martial.

The memory of those familiar with the legislative proceedings of this country will readily supply other cases in which the Legislative Assembly has claimed and exercised the right of attachment.

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(1) 1 Moore P. C. C. 59
(2) 4 Moore P. C. C. 63.
(3) 11 Moore P. C. C. 347.
(4) L. R., 1 P. C. 328.
(5) 5 L. C. R., 99.

But does this establish a usage in favour of the Legislative Assembly of the Province of Quebec?

In the first place, I would observe that the jurisprudence is not so conclusive as it might at first sight appear. The cases of *Monk*, *Tracy* and *Duvernay* were all decided prior to the case of *Kielley* v. *Carson*, which overruled the theory on which these Canadian cases were decided. There remains, then, only the case of *Lavoie*; and although the opinion of the learned judge who sat in that case evidently was that the Legislative Assembly of the late Province of Canada had privileges analogous to those enjoyed by the House of Commons in England, it was, perhaps, not necessary for him to decide that point. *Lavoie* was arrested under the provisions of two statutes of the Province of Canada, and the only question really before Mr. Justice Badgley was as to the form of the warrant. But against this case may be cited the case of *Cuvillier* v. *Munro*, (1) in which Chief Justice Rolland and Justices Day and Smith ruled that the privilege from arrest upon civil process does not attach to the members of the Canadian Legislature by virtue of any law or usage, and that it does not attach as a legal incident to the constitution of the Legislature, or by analogy between it and the Parliament of Great Britain.

Here then is a judicial decision which exactly meets the case of *Young*, the origin of this pretended usage in Canada. Again the case of *Beaumont* v. *Barrett* was mercilessly overruled, two of the judges who sat in it concurring, and no one ventured to hint that there was, or could be, any usage in the Island of Jamaica: yet the select committee of the Lower Canada House of Assembly, in 1818, justified the incarceration of Mr. *Monk* by the proceedings taken by the Legislative Assembly of Jamiaca against Major-General Carmichael.

In *Cuvillier* v. *Munro*, Mr. Justice Day said, that to constitute a usage "in England the period of time is technically expressed as that beyond which the memory of man reaches not, and this legal memory is supposed to extend back to the time of one of the earliest kings of the Conquest," Richard I. Hale (1 Common Law p. 4) says; "Whatsoever was before that time is before time of memory; what is since that time is, *in a legal sense*, said to be *within*, or since the time of memory."

No colonial dependency of the Crown of England, therefore, can have any such usage established in favour of its Legislative Chambers, or of the members thereof. Their history is not sufficiently long, nor is it requisite in our day that privileges of this sort should be allowed to grow up under the plea of usage.

But even were the usage established, it could not be extended from one body to another. Thus *Young's Case* in 1793 might perhaps justify *Monk's Case* in 1817, and *Tracey's* and *Duvernay's Cases* in 1832, but they could be no foundation for the cases under the Constitution of the late Province of Quebec. In 1838, the Constitution under the Act of the 31 Geo. III. was suspended in consequence of an armed insurrection, a new Constitution was substituted which subsisted for three years, and the old Constitution of Lower Canada was never restored. Again, the Constitution of 1840 was abolished at the request of the Legislature of Canada, and a totally new Constitution was substituted therefor. In addition to this, there is no analogy

(1) 4 L. C. R., 146.

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between the Legislative Assembly of the Province of Quebec and any of the legislative bodies which have subsisted since 1791. They had all general power to legislate for the peace, welfare and good government of the Province (14 Geo. III. c. 83, s. 12; 31 Geo. III. c. 31, s. 2; 1 Vict. c. 91, s. 3; 3 and 4 Vict. c. 35. s. 3), whereas the powers of the Legislature of the Province of Quebec are strictly limited to specified objects. They are restricted exclusively to the subjects enumerated in sections 92 and 93, and concurrently with the Parliament of Canada as to agriculture and immigration under section 95 of the B. N. A. Act; and this is so much the case, that if there is any clashing between the enumeration of the classes of subjects attributed to the Parliament of Canada and of those attributed to the Legislatures of the Provinces, the subject shall not be deemed to be of a local or private nature. They are markedly called Legislatures in contradistinction to Parliament. The Queen forms no part of these Legislatures, although through her representative the Governor-General she appoints the Lieutenant-Governors; and I take it she could not in her own person sanction a Bill of a local Legislature, although she names the officer who shall perform this duty, a bit more than she could perform the duties now devolving on me, acting under her commission and by her authority.

We have only then to enquire whether the power to compel the attendance of witnesses is a power necessary to the existence of a legislative body; and if not, whether the warrant is helped by the statute of Quebec of 1870?

It was objected on the part of the Speaker that I must take the law as I find it, and that no court can decide as to whether an Act is constitutional or not unless there is a conflict of legislation. The exception appears to me to destroy the main proposition. The limitation of the powers of a dependent Legislature by an Imperial Act gives rise to a conflict of legislation the moment the Local Legislature exceeds its powers.

It would be strange indeed if the courts here could take cognizance of a conflict between a Dominion and a Local Act, and be precluded from deciding as to whether the authority of the Imperial Act itself were contravened by a Local Act.

The difficulty we have in realizing this distinction arises from the maxim known to every one in England, that the validity of an Act of Parliament cannot be called in question; but this maxim is only true of an omnipotent Legislature like the Parliament of England. There is no such maxim under the Constitution of the United States, and it does not hold good unrestrictedly under the present Constitution in Canada. I say unrestrictedly, because the maxim holds good in a sense. The courts cannot enquire as to the mode of exercising a power, but only as to its existence.

An illustration from our own history will explain my meaning and prevent misapprehension on a point of importance. The Act of 1774 appointed a Governor and Council, with power to make ordinances for the peace, welfare and good government of the Province of Quebec; but one power, that of levying duties and taxes, was reserved. Now, I take it to be incontrovertible that if the Governor and Council, acting under the provisions of the Act of 1774, had imposed a tax on the real estate of the people of Lower Canada, the courts would not have hesitated to declare the ordinance to be illegal, null and void.

The inconvenience of every magistrate deciding as to the constitutionality of an Act was insisted upon; but it appears to me that this inconvenience

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is the inseperable result of dividing the legislative power. Could it be contended for an instant that a Justice of the Peace should give effect to a Local Act purporting to amend the law as to larceny? or that a Commissioners' Court should give heed to a Dominion Act restraining their jurisdiction to five pounds? It would be idle to contend that these are extreme cases. If the right exists in extreme it exists in delicate cases. It either exists or it does not, and if it exists it is the duty of the judge to exercise it to the best of his ability whenever called upon to do so.

As I had no doubt on this point, I did not think it necessary to hear petitioner's counsel upon it. It has already come up frequently before our courts since Confederation, and the decisions have been uniform in maintaining the right of the courts to decide on the constitutionality of an Act passed by a Legislature having a limited power to make laws. These cases were all examined by Mr. Justice Drummond in giving judgment in the case of the *Union St. Joseph* v. *Belisle;* and although the judgment in that case was reversed by the Privy Council, the point in question was not overruled. On the contrary, the Privy Council confirmed the ruling by declaring the Act to be within the powers of the Local Legislature.

Besides, I am not aware that any constitutional writer of note has expressed any doubt on this subject. In the despatch of Sir John Macdonald relative to this Act, quoted at the argument, he expresses doubts as to its constitutionality, but he refrains from advising its disallowance, because the necessity arising, the courts can pass on the question. Apart from any consideration of a purely personal character, it must be borne in mind that Sir John Macdonald was one of the authors of the Bill, and from the high and responsible position he held at the time of Confederation, his opinion is entitled to great weight on a question of this sort.

The next point is as to the right of the House to compel the attendance of witnesses at their bar. I understood the learned counsel for the Speaker to maintain, 1st, without laying claim to all the privileges of the House of Commons in England, that the right of each House of the Legislature to compel the attendance of witnesses was a power necessary to the carrying out of the objects for which the Local Legislature was created, and that without the Act, 33 Vict. c. 5, this power existed; 2nd, that the Act 33 Vict. c. 5, was within the scope of the functions of the Legislature of Quebec.

I cannot agree with either of those propositions. Necessity, to be the ground-work of a power of this sort, must be an absolute necessity; such, for instance, as the power of an assembly to keep order within the hall where its deliberations are carried on, but not a mere matter of convenience. In the case of *Doyle* v. *Falconer*, an outrage in face of the House was held not to justify a commitment. Now, the object of a Legislature is to make laws and not to take inquests. There cannot then be any absolute necessity in their hearing witnesses. So much is this the case that there is no common law right to examine a witness under oath in committee or before either of the Houses of Parliament in England, except only in cases of impeachment, before the Lords. There is not, therefore, anything judicial in such a proceeding. The so-called witnesses are merely advisers; what they say has only argumentative authority, for *in judicio non creditur nisi juratis.*

Among the classes of subjects on which the Local Legislatures are permitted to legislate, I cannot find anything to authorise the passing of such

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a law as that now invoked. The learned counsel for the Speaker argued that sub-section 1 of section 92, B. N. A. Act, which gives the power to amend the Constitution, except as regards the office of Lieut.-Governor, implied it. But that only refers to the matters under heading "Provincial Constitutions." Again, reference was made to section 65, but that again only preserves so much of the organization of the executive authority as is required for carrying on the affairs of the country. It has nothing earthly to do with the privileges of the Houses of the Legislature. Again, it was said they could punish by way of fine, penalty or imprisonment. But that is only for enforcing a law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in section 92, and, I take it, according to the procedure established in all other criminal matters.

The Dominion Act supplies another class of argument destructive of the pretension of the House of Assembly at Quebec, and it is this, that the Houses of our Parliament of Canada—which is only a limited Legislature, in the sense that it is deprived of certain legislative powers exclusively confided to the Local Legislatures—could not exercise any such right without statutory enactment; and further still, that the Parliament could not, by its own act, confer these privileges on the Houses. About the time the Ministers of Canada were at home preparing the way for the passing of the B. N. A. Act, *Doyle* v. *Falconer* was decided; and I understood that the judgment in that case suggested the introduction of section 18. *Doyle* v. *Falconer* does not maintain, however, the necessity of Imperial legislation to grant such powers; and I am inclined to think that a Legislature with general powers, unrestricted on this point, might give to anybody, and so to its Legislative Chambers respectively, powers similar to those exercised by the House of Commons in England. But be this as it may, the right was asked for and granted to the Parliament of Canada under the conditions that the powers should be defined by Act of the Parliament of Canada, and that they should never exceed those at the passing of the Dominion Act, held and enjoyed and exercised by the Commons House of the Parliament of Great Britain and Ireland, and by the members thereof. Parliament then has only the power in a restricted sense; and can it be for an instant maintained that a body possessing only special powers created by the same Act, should have, by implication, rights denied to the great egislative body of the country?

There is one section of the Local Act in question which suggests a doubt as to whether the Legislature of Quebec had any very sincere belief in its powers to pass it. Section 3 absolves from responsibility for civil damages for anything done under a warrant issued under the authority of the House.

If they had the power to pass the Act, no action could lie, and the section was unnecessary; if they had not the power, then this clause simply attempts to absolve certain persons from the civil consequences of a trespass.

I do not think it necessary to allude to the form of the warrant. It is plain that in issuing such a warrant the Speaker was not relying on the statute, for it is elementary that a statutory power does not authorize the assertion of its authority in a form so laconic as that adopted by the Speaker in the present instance. As little can it be supported on the modified theory of the Legislative Assembly possessing inherently those powers necessary

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for its existence. If a warrant so general in its terms can be supported in any case—which may fairly be doubted—it can only be on the assumption that the authority issuing it has all the privileges, immunities and powers of the English House of Commons. As it stands, the warrant only discloses an arbitrary arrest—an arrest absolutely without cause, and consequently a flagrant and dangerous violation of the liberty of the subject.

In the remarks I thought it my duty to make, to explain the reason for the order I must now issue, I have avoided any allusion to the object which every one of course knows the Legislative Assembly has in view in these proceedings, and this because I am not judicially seized of any such matter. This, however, I may add: that the utility of the object in view could, under no circumstances, affect my judgment. A bad precedent is generally established to serve momentary convenience.

On the whole, then, I am of opinion that the warrant must be declared illegal and quashed, and the petitioner be discharged from custody.

The same order must go in the case of *Duvernay*.

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

1877*
March 16.

MACDOUGALL ET AL. *v.* THE UNION NAVIGATION CO.

[*Reported 21 L. C. Jurist, 63.*]

Navigation Co., incorporation of by Provincial Government—B. N. A. Act, s. 92, sub-s. 10—31 Vict. c. 25, Q.

The power to incorporate a navigation company the operations of which are limited to a particular Province belongs exclusively to the Legislature of such Province.

This was an appeal from the judgment of the Superior Court at Montreal (Johnson, J.), in an action by the respondents for calls on stock alleged to be held and owned by the appellants.

On the sixth of August, 1874, the respondents were incorporated by letters patent for the purpose of establishing a line of steamboats between Quebec and Montreal. The letters patent were issued under the authority of the Quebec Joint Stock Companies Incorporation Act, 31 Vict. c. 25. The appellants, amongst other objections to the action, contended that the said letters patent were *ultra vires* of the Quebec Government.

[*Translated.*]

The judgment of the Court was delivered by

TESSIER, J. :——

The Court below considered that these letters patent

* Present:—MONK, RAMSAY, SANBORN, and TESSIER, JJ.

were not invalid, that the Government of Quebec had power to issue them for a company the operations of which were limited to the Province of Quebec.

The Government of the Province of Quebec had alone the power to grant letters patent for the incorporation of the respondent company.

Section 92 of the B. N. A. Act, 1867, says: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated:—

"10. Local works and undertakings other than such as are of the following classes:

"(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

In 1868 the Legislature of the Province of Quebec passed an Act (31 Vict. c. 25) to regulate the incorporation of joint stock companies and gave power to the Executive to authorize by letters patent the formation and incorporation of such companies for the objects enumerated in the said Act, and among others for (sec. 2, sub-s. 9): "Carrying on any forwarding business, and the constructing, owning, chartering or leasing ships, steamboats, wharves, roads, or other property required for the purpose of such forwarding business."

Now the letters patent granted to the respondent company have been so granted in virtue of the powers conferred by this statute on the Provincial Executive. The object for which the company is incorporated is stated in the very terms of the clause of the statute just cited, with the simple addition of these words: "in our said Province."

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This Court is of the same opinion, and on this point concurs in the judgment of the Court below, which has sustained the demurrer and given judgment against the appellants.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

NORMAND *v.* THE ST. LAWRENCE NAVIGATION CO.

1879*
March 8.

[*Reported 5 Q. L. R. 215.*]

Navigation and Commerce—Water Lot on Navigable River, grant of by Provincial Government

The Government of the Province of Quebec, having by letters patent granted a water lot extending into deep water, at the mouth of the river St. Maurice, the letters patent were held to be valid, subject to an implied restriction that the requirements of navigation and commerce were not to be interfered with or injured thereby.

[*Translated.*]

The judgment of the Court was delivered by

TESSIER, J.:—

The appellants Normand, having obtained letters patent from the Government of the Province of Quebec for a water lot extending into deep water, at the mouth of the river St. Maurice, have sued the St. Lawrence Navigation Co. for $250 for use and occupation of the shore, of the deep water and of the main land, and damages for seven vessels wintered by the said company in the aforesaid deep water of the St. Maurice, from November, 1874, until May, 1875.

The company traversed these allegations generally and pleaded besides that these letters patent were void, and *ultra vires* of the Government of the Province of Quebec,

*Present:—DORION, C. J., and MONK, RAMSAY, TESSIER, and CROSS, JJ.

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and prayed that they might be declared void. After hearing evidence these letters patent were declared void, as being *ultra vires* and beyond the constitutional powers of the Province of Quebec.

This judgment is erroneous in declaring void these letters patent. These letters patent grant the shore and the land as far as deep water belonging to the Province of Quebec, under the implied restriction that they do not in any way injure or interfere with the requirements of commerce and of navigation. If these letters patent interfered with these matters, the Federal Government might have them set aside on that ground. It might be said that it would have been better to have added in these letters patent a clause to this effect: "provided that they do not interfere with the navigation or with commerce;" but they cannot confer more rights than those for which the parties have reasonably wished to stipulate.

As a matter of fact the object of such grants is to cause the building of wharves, the construction of improvements on the shores and along the rivers for the protection of navigation and the encouragement of commerce.

This has been the interpretation given throughout the Dominion of Canada to that division of powers which results from the Federal compact.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

JUDGMENT IN SUPERIOR COURT (*before which the suit came originally*).

[*Reported 4 Quebec Law Rep. 1.*]

[*Translated.*]

POLETTE, J. :—

Whereas the plaintiffs found their claims on the letters patent to them of the Quebec Government, dated September 1st, 1873, grant-

ing them a lot of land in deep water in the east channel of the river St. Maurice, in the District of Three Rivers, bounded on the north-east by the ordinary low water mark in front of their property, extending along its whole front and adjacent thereto, and bounded on the other sides by the deep water of the said river as the same is described in the letters patent and the plan thereto annexed, and claim from the defendants the amount stated in their demand for use and occupation and damages for that the said defendants at the close of navigation in the Fall of 1874, towards the end of November, without right or permission wintered seven steamboats to them belonging in the river St. Maurice, within that part of the deep water above mentioned of which the plaintiffs claim to be the owners in possession by virtue of the said letters patent, which said vessels remained in the said deep water until the opening of navigation in 1875, about the 1st of May; and also for that the said defendants, without right or permission as they thought fit, made use as well themselves as by their servants of the shore and soil belonging to the plaintiffs by daily passing and re-passing during the whole season of the winter and spring over the soil of the plaintiffs and damaging the property of the plaintiffs:

And whereas the defendants, amongst other defences, plead that the lot of shore and deep water granted to the plaintiffs by the Government of the Province of Quebec forms part of the river St. Maurice, at its mouth where it falls into the river St. Lawrence, and that at this place it forms part of the St. Lawrence; that the Government of Quebec had no right to grant this lot of shore and deep water which is under the control of the Government of the Dominion of Canada, and that the letters patent are prejudicial to the navigation of the said rivers; that the letters patent do not impose any obligation to construct on said lot any wharves or other works; that the grant was made without the consent or approbation of the Government of the Dominion of Canada, and that consequently they are void; that the spot occupied by the steamboats of the defendants forms part of the navigable waters of the said rivers; that the plaintiffs have not made wharves nor other works on the said lot of shore and deep water of which they have never been in possession, being the place where the defendants' vessels wintered, and which is still open and free to navigation, including therein the wintering of vessels; that even allowing the validity of the letters patent, the plaintiffs could not claim the right to be paid any indemnity before making such works or outlay as could with-

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draw the lot from public commerce or be serviceable or of use to the navigation; that the spot where the defendants placed their vessels at the time above mentioned has no value, and that the said occupation has not in any way prejudiced the plaintiffs nor caused them any damage; that the servants of the defendants have not even passed over the property of the plaintiffs to reach the company's vessels, but wholly over the property of George Baptist & Sons, and that the plaintiffs are not the riparian proprietors at the spot where the said lot of shore and deep water is; and that the defendants deny the statements in the plaintiffs' declaration and move to have the letters patent declared void and the plaintiffs' action dismissed:

And whereas by special replications to the two first pleas of the defendants, the plaintiffs alleged, amongst other things, that the letters patent have been granted according to law, after notice given to the proper authorities representing the Government of the Dominion of Canada who consented thereto; that the Government of the Province of Quebec has besides the power to grant such letters patent, and that this power existed and has been acted upon for the past eight years and more; that such power is by the B. N. A. Act., 1867, conferred upon the Government of the Province of Quebec; that the defendants do not set out any of the reasons or defects which are necessary to obtain the cancellation of the letters patent, which can only be cancelled for mistakes in matters essential, and that none such are pleaded in the defence; that the plaintiffs have by letters patent obtained the right to make use of the portions of the shore and deep water as their property and as lands held in free and common socage, free from any obligation or restriction; and that they deny all the facts and matters contained in the pleas of the defendants and move that those defences may be dismissed:

And whereas the Government of the Province of Quebec has been informed of this action by service of copies of the plaintiffs' declaration, and the defendants' pleas upon the Attorney-General of the said Province, who in reply to the demand made upon him to intervene on behalf of the Crown, has stated that he is of opinion that it is unnecessary for the Crown to appear or intervene; considering 1stly, that by the B. N. A. Act, 1867, the legislative authority of the Dominion of Canada extends over all subjects and matters mentioned in section 91 of said Act, among which are to be found navigation and shipping as well as beacons, buoys, light-

houses, sea coast and inland fisheries, which subjects it is there said do not fall within the category of matters of a local nature coming within any of the classes of subjects which are assigned to the Provincial Legislatures; and that consequently the exercise of the rights and powers which flow therefrom belongs exclusively to the Executive Government of the Dominion; 2ndly, that the Government of the Dominion having the whole authority, legislative and executive, over navigation and shipping, consequently has it also over navigable streams and their beds, as well as over their banks and shores so far as is necessary for navigation; 3rdly, that as the powers of the Provincial Legislatures do not extend over navigable streams nor their beds nor their banks, but only so far as concerns the public domain, to the management and sale of the public lands belonging to the Provinces and over the woods and forests found thereon, and as the executive powers of the Provinces extend no further over this subject, it follows that the Government of the Province of Quebec had no power to grant the lot of land above mentioned up to deep water, nor consequently to issue the letters patent now in question, which are void on their face; and considering 1stly, that even supposing the letters patent to be valid, they could nevertheless confer no greater rights than the Sovereign herself possessed, who cannot by any grant interfere with the free navigation of navigable streams nor the use of their banks for purposes of navigation, nor impose any tolls therefor; 2ndly, that the river St. Maurice at the place where the defendants' steamboats wintered, is navigable, and that the navigation of vessels from one place to another over the navigable streams in this Province being necessarily prevented during the whole winter and parts of the autumn and spring, vessels during such time go into winter quarters, whether in the St. Lawrence or the lesser streams, which is all part of navigation and cannot be separated from it, and gives the same rights as well over the streams where they winter as over their banks, in order to place them there and keep them in safety, to rig and unrig them, to keep watch and guard over them and to visit them when necessary; 3rdly, that the plaintiffs have not made wharves nor other works on the above mentioned lot of land in deep water nor on the bank for the improvement of navigation nor for the wintering of vessels so as to have the right to demand compensation, that therefore the plaintiffs have no right to demand any sum from the defendants for the use and occupation of the place where the steamboats of the defendants have wintered, nor for the

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passage of their servants over the bank of the river at the same place :

And considering that the soil over which the servants of the defendants have passed and repassed is uncultivated ; that these servants have passed thus in beaten paths for a number of years in order to reach the public road which at this place is near the bank of the river, and where many persons were in the habit of passing almost daily, and that they did not appear to have caused any damage ; that it does not appear that the plaintiffs nor their predecessor ever forbade any one from passing there, and that for these reasons the plaintiffs cannot claim any damages from the defendants:

Therefore the Court doth declare the aforesaid letters patent void on their face, and moreover cancels and annuls them, and dismisses the plaintiffs' present action with costs.

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

1880*
Feb. 4.

DANIEL MCCLANAGHAN (*Petitioner in the Court below*) ..... } *Appellant;*

v.

THE ST. ANN'S MUTUAL BUILDING SOCIETY ET AL. (*Defendants in the Court below*). } *Respondents.*

[*Reported 24 L. C. Jurist, 162.*]

Insolvency—Civil rights—Liquidation—42 Vict. c. 48, D.

An Act of the Dominion assuming to provide for the liquidation of all building societies in the Province of Quebec whether solvent or not, was held to be beyond the competence of the Dominion Parliament.

DORION, C. J.:—

This appeal is from a judgment dissolving an injunction which the appellant obtained against the society, respondent.

The appellant complains that having purchased an appropriation of $2,000 awarded by the society, he applied for the money and offered security as required by the by-laws of the association; that the security was declared insufficient, and that he tendered additional and adequate security; that without adjudicating upon the new securities offered, the society entered into liquidation under the Dominion statute, 42 Vict. c. 48, and was about to declare a dividend which would include the $2,000 which he was entitled to for his appropriation;

*Present:—DORION, C. J., MONK, RAMSAY, and CROSS, JJ.

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Dorion, C. J.

that this statute was *ultra vires*, and the society had no right to go into liquidation under its provisions. Wherefore he applied for a writ of injunction, which was issued on the 26th of August, 1879, restraining the society and its officers from declaring a dividend, and from proceeding to the liquidation of the affairs of the society.

The Superior Court maintained the defence set up by the society, and held that the Board of Directors, in the proper exercise of their discretion, were justified in rejecting the security offered by the appellant as insufficient, and that the proceedings in liquidation were well taken under the Dominion Act, which was not *ultra vires*.

While these proceedings were pending in the Court below, the Local Legislature of the Province of Quebec passed a statute re-enacting, as to the Province of Quebec, all the provisions of the Dominion Act, and also another statute ratifying all the proceedings adopted under its provisions. The last Act was not, however, to affect pending cases. These two statutes, 43 Vict. c. 32 and c. 33, were sanctioned on the 31st of October, 1879.

The judgment has been rendered and the appeal taken since the passing of these two statutes, and since the proceedings of the society to wind up their affairs have been ratified by the Quebec Legislature.

We cannot agree with the Court below that the Dominion Parliament had the right to pass the Act, 42 Vict. c. 48. This Act is not in the nature of an insolvency law, for it is intended to apply to all building societies, whether solvent or not. It is therefore essentially an Act affecting civil rights, which, under the provision of B.N.A. Act, 1867, comes within the exclusive jurisdiction of the Local or Provincial Legislatures.

The case of *L'Union St. Jacques* v. *Belisle* (1) is in point.

(1) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

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In that case the Lords of the Privy Council decided that a law authorizing a benevolent association, in financial difficulties, to compel parties to accept a fixed indemnity in lieu of the annuities to which they were entitled under the rules of the society, was within the legislative powers of the Legislature of the Province of Quebec, as affecting civil rights only.

We cannot, therefore, consider the proceedings in liquidation adopted by the society as legal. But, these proceedings having been rendered valid by the Quebec Legislature, there is now no ground to restrain the society from proceeding to the liquidation of their affairs, and there was none when the judgment of the Court below was rendered and when this appeal was instituted. The judgment dissolving the injunction must, therefore be confirmed.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

JUDGMENT IN SUPERIOR COURT (*before which the case came originally*).

[*Reported 24 L. C. Jurist, 162.*]

TORRANCE, J. :—

This was a petition for a writ of injunction. The petitioner set forth that he was a member of the building society, incorporated under the Consolidated Statutes of Lower Canada, c. 69, and under rule 8 of the society he was proprietor of an appropriation of $2,000, and had conformed to the requirements of rules 9 and 10, which authorize the proprietor of an appropriation to furnish security on real estate of sufficient value to obtain the amount of the appropriation. That the security had been judged sufficient according to the rules, but the society had refused to deliver the amount. Moreover, the society had gone into liquidation, under the pretended authority of the Federal Act, 42 Vict. c. 48 (15th May, 1879). That a dividend was now (26th August, 1879) to be distributed to the shareholders, portion of which comes out of the appropriation in question ; that the Act in question by the Federal Legislature

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Torrance, J.

was unconstitutional, and the liquidation at any rate could not take place in prejudice of the rights of petitioner. An injunction was, therefore, asked for against the society, liquidators and secretary-treasurer, prohibiting them from distributing the funds, and adjudging that they had no power to proceed to said liquidation, and prohibiting the said corporation from doing so.

The defendants pleaded that one W. E. Doran was a member of the society, and on 22nd June, 1878, was allotted by ballot an appropriation of $2,000, which he transferred to petitioner on the 22nd April, 1879, who then became a member of the society bound to conform to its rules. That the subject of liquidation had been for a considerable time, before 22nd April, 1879, before the shareholders, and it was a matter of public notoriety that they would go into liquidation, and the said Federal Act was so passed to enable building societies to do so. That the property offered as security by petitioner was not sufficient for the purpose, and the directors, in the exercise of the discretion conferred upon them by the by-laws, declined to make the advance in question, and by letter of 9th May informed petitioner that his application could not be entertained without additional security; that at the annual general meeting, 14th May, a resolution was passed instructing the directors to loan no further amounts pending a settlement of the society's affairs, to wit, by liquidation, under said Act; that petitioner did not offer the additional security, and on 16th June the society went into liquidation. Petitioner answered that the directors had never regularly refused the guarantee, but had refused the advance in order to go into liquidation; that they had asked the additional guarantee, which was at once given. That the assembly of 14th May had not power to order the liquidation. That the Federal Act was only passed subsequently.

Two questions present themselves: 1. The sufficiency of the security and the exercise of discretion by the directors of the society. 2. The validity of the Act of the Federal Legislature. 42 Vict. c. 48. [The learned judge held that the petitioner failed on the first point, and as to the second said:—] It may be unnecessary to pronounce upon the validity of the Federal Act (15th May, 1879), 42 Vict. c. 48, but it appears to me that a Legislature which has power in matters of bankruptcy and insolvency and savings banks, may reasonably claim power to legislate for the liquidation of this society, for the reasons mentioned in the preamble to the Act.

Petition dismissed.

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

THE MUNICIPALITY OF CLEVELAND ET AL. (*Plaintiffs below*) ..... } *Appellants;*

v.

THE MUNICIPALITY OF MELBOURNE AND BROMPTON GORE, (*Intervenants below*) } *Respondents.*

1881*
Feb. 26.

[*Reported 4 Legal News, 277.*]

Property and Civil Rights—Matters of a merely local nature.—32 Vict. c. 15, Q.

An Act of the Legislature of Quebec authorizing the Lieutenant-Governor to revoke the right of certain municipalities to exact tolls on a toll-bridge, for default in making repairs, and to transfer the property to others, was held valid; as the matter related to property and civil rights and was of a merely local nature.

The action was brought in the Court below by the appellants, three corporations, viz., the municipality of the Township of Cleveland, the municipality of the village of Richmond, and the municipality of the village of Melbourne, against one Holmes, their tenant, and his sureties, for $144.16, being one month's rent of the tolls and toll-house of the toll-bridge across the St. Francis River, between the villages of Richmond and Melbourne.

The respondents, the Township of Melbourne and Brompton Gore, intervened, claiming to be owners of one undivided half interest in the bridge, and they put in issue the appellant's title and possession of the bridge in

* Present:- DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

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STATEMENT.

question. The bridge had been granted to the municipalities of Melbourne and Cleveland, but subsequently requiring repairs, the grant was revoked by the Provincial Executive, and a grant made to the appellants, who undertook to make the necessary repairs. The Court below (Circuit Court, St. Francis, Doherty, J.) maintained the intervention, on the ground that the Order in Council was *ultra vires*.

RAMSAY, J.:—

The first question that is raised on this appeal, is as to the nature of the title conveyed by the Order in Council, of 21st November, 1857, to the then municipal councils of the Townships of Cleveland and Melbourne, as then constituted, *auteurs* of the parties now appellants and respondents.

On reference to the sections of the statute, under the authority of which this Order in Council was passed (12 Vict. c. 5, ss. 12 and 13), it appears evident that the Government of the then Province of Canada had full power to alienate completely, and without any restriction whatever, in favour of any district or municipal council, or other local authority or company, any public roads, harbours, bridges or public buildings. The words of the statute are "to grant and by so granting to transfer and convey." The Crown could of course limit the estate so conveyed, but whatever right was so conveyed became the property of the grantee, and this grant could not be revoked without the consent of the grantee "attested by signature or seal, or both, as would be sufficient to make any deed or agreement, the deed or agreement of such grantee." Sec. 13.)

In the Order of Council, granting this bridge to the councils of the townships of Cleveland and Melbourne, it does not appear that there was any right reserved by the

Provincial Government to revoke this particular grant, and indeed no such pretension is put forth. It was, however, contended at the argument that the Crown had a right to take any property for public uses; that it had, therefore, the right to resume the possession of this bridge without process of law, and that the local Government, inheriting this right, might enter upon any property and take possession of it, of its own authority. The Court disposed of this proposition at the argument, and it is unnecessary to refer to it again.

The question in dispute between the parties really turns on the action, of the Local Government of Quebec, under the terms of the 32 Vict. c. 15, s. 190.

By that Act it is provided that the Commissioner of Public Works may make or cause to be made a report of the state of any toll-bridge, and he may on any such report, order the bridge to be repaired within a certain time, and if it be not so repaired, then the proprietor of the bridge shall forfeit the right of exacting tolls, for passage on the bridge and all other privileges conferred upon him by the Act respecting such bridge. Then subsection 5 continues that "from the day of the publication of such proclamation, the bridge mentioned therein shall become the property of the Province, and the Lieutenant-Governor in Council may transfer the property therein and the control thereof, either to the municipality in which the same is situate, or to any other neighbouring municipality, together with all the rights and privileges which the former proprietor thereof enjoyed, and upon such transferee becoming bound to perform upon such bridge the work ordered by the Commissioner, and to keep the same for the future in good repair."

It is contended by respondents that this Act only applies to toll-bridges forming part of the public works of the Province, that a local Act cannot deprive a person

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Ramsay, J.

of his property without process of law, and that this Act cannot affect the bridge in question, as it falls under the control of the Dominion Parliament. The legislation in question is perhaps of very questionable policy, but it is not the province of the Courts to guide the policy of the Legislature. They may consider the reason of a law to interpret its doubtful provisions, or to give effect to the manifest intentions of the legislator, but they have no right to suspend the operation of an Act clearly expressed.

In this case I cannot think there is any ambiguity in the language of the statute. It applies to "any toll-bridge," and it specially refers to toll-bridges the property of which is not vested in the Government of the Province. In sub-section 3, we find that by proclamation the bridge may be declared to be closed, "and the proprietor thereof to have forfeited the privilege of exacting tolls for passage over the same, together with all other privileges conferred upon him by the Act respecting such bridge." And again in sub-section 5, we have it enacted that "From the day of the publication of such proclamation, the bridge mentioned therein shall become the *property* of the Province," etc. It was not then a public work in the sense of a Provincial work, before that. It was treated of as a public work because it was a work the owner of which had special privileges, because of its being a work for the public use.

I do not think any Legislature has the *right* to deprive a person of his property, but by the theory of the constitution it has the *power*. In a word, it is assumed that the Legislature is the judge of the morality of its own legislation.

It seems to me that this bridge and the rights conveyed by the Order in Council are "property in the Province," in fact it is the starting point of the respondents' argument, that the statute is an interference with vested

rights of property. Again it is property held by a municipal institution in the Province. Further it is a matter of a merely local nature, And lastly, I do not see anything in the enumeration of the legislative powers of Parliament to except the toll-bridges belonging to municipalities from the control of the Local Legislatures.

A technical point was raised by appellants that the grant was to the councils of the municipalities of Cleveland and Melbourne, and that the intervening parties have no interest in the contest, that even if they represent the municipality of the Township of Melbourne they do not represent the council. There is nothing in that. The grant to the council was in compliance with the terms of the 12 Vict., and it was a grant to the council which only existed as the agent or representative of the municipality.

The judgment is reversed.

Ives, Brown and *Merry* for appellants.

Hall, White and *Panneton* for respondents.

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

NARCISSE NOEL.....*Appellant*;

v.

THE CORPORATION OF THE COUNTY OF RICHMOND.....*Respondent.*

1881*
March 22.

[*Reported 1 Dorion's Quebec Appeals, 383.*]

Temperance Act of 1864—Trade and Commerce, Regulation of.—B.N.A. Act, s. 91, sub-s 2, and s. 129.

The B. N. A. Act, in assigning to the Parliament of Canada the exclusive legislative authority over "the regulation of Trade and Commerce," did not thereby repeal "The Temperance Act of 1864," of the late Province of Canada, 27-28 Vict. c. 18, and did not deprive municipal corporations of the power thereby given to prohibit the sale of intoxicating liquors.

On the 14th of March, 1877, the Municipal Council for the County of Richmond passed a by-law, under the authority of "The Temperance Act, 1864," commonly called the "Dunkin Act," prohibiting the sale of intoxicating liquors and the issuing of licenses within the municipality of the County of Richmond. This by-law was approved by the electors, and came into force on the first of May following.

On the 6th day of December, 1879, the appellant, who was an hotel-keeper in the County of Richmond, prayed that a writ of injunction do issue, the conclusions of which were to the effect that the said by-law be declared null and void, and that the respondents be ordered and enjoined to desist from carrying out and executing the said by-law.

*Present:—DORION, C. J., MONK, CROSS, and BABY, JJ.

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STATEMENT.

The contention of the appellant was that, since the B. N. A. Act was passed, the power to regulate trade and commerce belongs to the Parliament of the Dominion of Canada, and that the powers formerly granted by the Parliament of the late Province of Canada to the municipal authorities to prohibit the sale of intoxicating liquors are virtually and implicitly repealed, and that the by-law is therefore *ultra vires*.

The respondents answered to this petition that the allegations therein contained are insufficient in law to justify its conclusions—1st. Because the Act 41 Vict. c. 14 (Quebec), under which the appellant's proceedings were taken, did not authorize the issue of a writ of injunction to suspend a by-law of a municipal corporation; 2nd. Because under the provisions of the Temperance Act of 1864, after the expiration of three months after its coming into force, the by-law can be attacked and set aside only under the provisions of and after the observance of the Temperance Act of 1864, or of the Temperance Act of 1878; 3rd. Because the respondents, at the time of the enactment of the said by-law, had full power and authority to restrain the sale of intoxicating liquors, as the Temperance Act of 1864 was continued in force by the Confederation Act, and this continuance was approved and confirmed by the Parliament of the Dominion of Canada.

Upon this contestation the Court below rejected the petition of the appellant, on the ground that the allegations thereof were insufficient in law, and the appellant now sought to obtain, by this appeal, the reversal of this judgment.

DORION, C. J.:—

The main question raised by the appellant is that by the passing of the B. N. A. Act of 1867, the powers

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granted to municipal corporations by the Legislature of the late Province of Canada to prohibit the sale of intoxicating liquors, have been implicitly repealed, inasmuch as the powers to regulate trade and commerce have been conferred on the Dominion Parliament and are inconsistent with the powers conferred on the municipalities by the said Act.

This is an error, for section 129 of the B. N. A. Act of 1867 expressly enacts that : " Except as otherwise provided by this Act all laws in force in Canada, Nova Scotia, or New Brunswick, at the union . . . . shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, as if the union had not been made; subject, nevertheless . . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

This provision applies to all laws in force at the time of the confederation, whether such laws affected trade and commerce or not.

There is no provision in any portion of the B. N. A. Act repealing the Temperance Act of 1864, and until repealed by proper authority it remained in force in the Provinces of Ontario and Quebec, as it was in force in the late Province of Canada, before confederation took place.

When the by-law was passed in 1877, the Temperance Act of 1864 had not yet been repealed, and the Corporation of the County of Richmond had therefore proper authority to pass the by law under the provisions of the said Act.

This is not all. In 1878 the Dominion Parliament passed the Temperance Act of 1878 (41 Vict. c. 16), and by section 3 of this last Act the Temperance Act of 1864 was repealed as to all counties except those within the

limits whereof by-laws were at that date in force, and as to the latter counties (those wherein by-laws were in force) it was enacted that the Temperance Act of 1864 should be repealed "from and after the day next following the day on which such by-law is repealed, under the provisions of the said Act (*i.e.*, the Temperance Act of 1864), or of this Act (*i.e.*, the Temperance Act of 1878)."

The by-law passed by the Corporation of the County of Richmond has not yet been repealed, neither under the Temperance Act of 1864, which is still in force as regards that by-law, nor under the Temperance Act of 1878. Therefore, it is clear that the Temperance Act of 1864, which was in force when the by-law was passed, and which is recognised by the Act of 1878, is still in force, at least as regards the County of Richmond. The question, therefore, admits of no doubt whatever, and the judgment rendered by the Superior Court must be confirmed.

Judgment confirmed.

L. C. Belanger, Q.C., for appellant.

Hall, White, and *Panneton*, for respondents.

QUEBEC COURT OF QUEEN'S BENCH— APPEAL SIDE.

1881*
March 22,

JOHN C. BENNETT, THE YOUNGER.....*Appellant;*

v.

THE PHARMACEUTICAL ASSOCIATION OF THE PROVINCE OF QUEBEC.....*Respondents.*

[*Reported 1 Dorion's Quebec Appeals, 336.*]

Legislative Power, distribution of—Quebec Pharmacy Act, 1875—Fines, power to appropriate.

The B. N. A. Act, in assigning either to the Dominion or Provincial Legislatures power to legislate on any particular subject, gives at the same time all the incidental subjects of legislation necessary to the exercise of the power so assigned.

A Provincial Legislature has authority to determine the age or other qualifications which shall be required on the part of persons resident in the Province, to entitle them to manage their own affairs, or to exercise certain professions or branches of business attended with danger or risk to the public. If laws on these subjects incidentally affect trade and commerce, this incidental power must be deemed to be included in the right to deal with those matters which are specially placed under Provincial control.

The Quebec Pharmacy Act of 1875, so far as it requires certain qualifications on the part of persons exercising the business of selling drugs and medicines, is valid.

The Provincial Legislatures have the right to appropriate fines to municipal or other corporations.

The appellant (petitioner) being sued for carrying on the business of druggist and chemist, prayed for an injunction to restrain the respondents from prosecuting

*Present:—DORION, C. J., MONK, RAMSAY, CROSS, and BABY, JJ.

him under the provisions of the Quebec Pharmacy Act of 1875.

The petitioner alleged that he was competent to carry on the trade of chemist and druggist, and that he held a certificate from the Ontario College of Pharmacy of the Pharmaceutical Association of Ontario, entitling him to carry on his trade in any part of the Province, this certificate establishing that he was a practical chemist and druggist.

That notwithstanding this certificate the petitioner had been molested and troubled by a prosecution before the Police Court by the respondents for using the title of chemist and druggist.

That the Pharmacy Act of 1875, under which the prosecution against the appellant was taken, is unconstitutional, *ultra vires*, and beyond the power of the Legislature of the Province of Quebec, the said Act being in effect an interference with and an infringement upon trade and commerce, which by the B. N. A. Act, 1867, fall exclusively under the jurisdiction of the Parliament of the Dominion of Canada.

That the Legislature of the Province of Quebec had no power to pass the said Act authorizing the imprisonment of the petitioner, or of any one prosecuted under the said Act, in default of paying the fine imposed for the exclusive benefit of respondents, the said Legislature having only the power to imprison a person in default of payment of a fine devoted in whole or in part to a revenue for Provincial purposes.

That under the Pharmacy Act of the Province of Ontario the appellant was entitled to demand from the respondents, under certain conditions and qualifications, a license to do business in the Province of Quebec, which demand was made by the appellant and refused by the respondents.

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STATEMENT.

It is admitted in this cause—1st. That the petitioner has for about one year carried on business as chemist and druggist in the city of Montreal; 2nd. That he holds a license from the Ontario College of Pharmacy; 3rd. That a prosecution was instituted before the Police Court against the appellant by the respondents, but in the name of Mathew Mercer; and 4th. That the petitioner always had a good moral character.

Upon this the Superior Court declared that the Act 34 Vict. c. 52, incorporating the respondents, and the amending Act of 1875, were not for the purpose of regulating trade and commerce, but merely to exact certain qualifications from persons practising pharmacy; that pharmacy was a branch of medicine and under the control of the Legislature of the Province of Quebec, and therefore dismissed the demand of the appellant for an injunction against the respondents.

DORION, C. J.:—

The question here is as to the constitutionality of the Act incorporating the respondents and the Act amending the same. These questions (arising from the powers conferred on the Provincial and Dominion Legislatures) are surrounded with great difficulties.

The appellant here urges that the Quebec Pharmacy Act of 1875, which is only an amendment of a previous Act passed in 1870, is unconstitutional, on the ground that the Act attempts to regulate trade and commerce, a subject which falls exclusively within the jurisdiction of the Parliament of the Dominion of Canada.

The object of the Act is not directly to regulate the trade and commerce of drugs, but to impose on persons exercising the business of selling drugs and medicines certain qualifications for the protection of the public. In that respect it is of the same nature as the several Acts

requiring from persons exercising the liberal professions of lawyer, surgeon ,and physician certain qualifications before they are authorized to practise: or again, in the nature of restrictions imposed upon minors, interdicted persons, and others who are considered by law as unfit or unqualified to act on their own behalf, either in matters of trade or in the management of their own business. Viewed in that light, the Pharmacy Act of 1875, no more than the Act of 1870, can be considered as imposing restrictions on trade. They do not in any way prohibit or restrict the sale of drugs or medicine, they are mere personal restrictions imposed for the protection of the public on those by whom such sale is carried on.

The case of the *City of Fredericton* v. *The Queen* (1) has been cited as shewing that the Dominion Parliament alone can regulate matters appertaining to trade and commerce. This case has reference to the Temperance Act of 1878, passed by the Dominion Parliament, which had been declared *ultra vires* by the Supreme Court of New Brunswick, whose judgment was reversed by the Supreme Court of Canada.

Without entering into the merits of that case, especially since we understand that an application is to be made to carry it to the Privy Council (2), where a final settlement of the question will be arrived at, we find that the two Acts are entirely different. The object of the Temperance Act of 1878, after certain preliminary conditions being first accomplished, is expressly to prohibit entirely and absolutely the sale of intoxicating liquors within those portions of the Dominion to which the Act is made to apply. In the present case there is no prohibition to sell drugs or medicines in any part of

(1) 3 Can. S. C. R. 505 ; *ante* p. 27.

(2) [The decision of the Supreme Court of Canada has since been affirmed by the Privy Council, *Russell* v. *The Queen*, 7 App. Cas. 829 ; *ante* p. 12.]

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the Province of Quebec, the provision is merely that drugs and medicines shall only be sold by persons having the qualifications provided for by the Act.

It is true that incidentally this may be considered as interfering in some degree with the sale of drugs and medicines in the Province of Quebec, since it limits the number of persons who can do that business, but it must be remarked that in many instances the powers confided to the Local Legislatures trench, more or less, upon the powers entrusted to the Dominion Parliament, just as the exercise of the powers entrusted to the Dominion Parliament must trench upon the powers confided to the Local Legislatures. We have an example of this in the recent case of *Cushing* v. *Dupuy* (1), when it was contended that those portions of the Insolvent Act of 1875, passed by the Dominion Parliament, which interfered with the procedure established by the Code of Civil Procedure of Lower Canada, or by the Provincial statutes were *ultra vires.*

The Privy Council, in dealing with the question, took a comprehensive view of the whole matter. Their Lordships held that, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, the B. N. A. Act of 1867 intended to confer on the Dominion Legislature also the power to interfere with the civil rights and procedure, so far as the subjects of bankruptcy and insolvency might affect them. It was there remarked that it would be extremely difficult to frame a bankrupt law which would not in a great measure affect civil rights and, more especially, the ordinary procedure followed in the Courts of the several Provinces.

A great many of the powers given to one Legislature must necessarily affect those given to the other. Thus

(1) 5 App. Cas. 409 ; *ante*, vol. 1, p. 252.

the police regulations requiring that hotels, taverns, and saloons be closed at a certain hour of the night, although to some extent affecting trade and commerce, have been held by several judgments, both in Upper and Lower Canada, not to be an infringement upon the powers of the Federal Parliament to regulate trade and commerce.

We consider as a proper rule of interpretation in all these cases that, when a power is given, either to the Dominion or to the Provincial Legislatures to legislate on certain subjects coming clearly within the class of subjects which either Legislature has a right to deal with, such power includes all the incidental subjects of legislation which are necessary to carry on the object which the B. N. A. Act declared should be carried on by that Legislature. The determining of the age or of other qualifications required by those residing in the Province of Quebec to manage their own business, or to exercise certain professions or certain branches of business attended with danger or risk for the public, are local subjects in the nature of internal police regulations, and in passing laws upon those subjects, even if those laws incidentally affect trade and commerce, it must be held that this incidental power is included in the right to deal with the subjects specially placed under their control, the exercise of which cannot be considered to be unconstitutional. The Pharmacy Act of 1875, in so far as this case is concerned, does not regulate trade and commerce. It merely determines the status of persons exercising the business of chemist and druggist. This is a civil right coming clearly within the powers of the Local Legislature. The judgment of the Court below must therefore be confirmed.

There is nothing in the other question raised.

The Provincial Legislature has the right to impose

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fines and to regulate the distribution of those fines. It can direct that a portion or the whole of it shall be for the benefit of the prosecutor or of a municipal or other corporation, just as it distributes the Provincial revenue in any manner it may choose to direct. It had the same power to enact that the fines levied under the Act should be for the benefit of the society respondent, as it would have, after receiving the fines as part of the Provincial revenue, to order that the amount should be paid back to the society for the objects of its incorporation.

Judgment confirmed.

Robertson & Fleet, for appellant.

Kerr, Carter & McGibbon, for respondents.

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

REGINA *v.* MOHR. 1881*
June 8.

[*Reported 7 Quebec Law Rep. 183.*]

Local works and undertakings—43 Vict. c. 67, D.

All works which are wholly within one Province, whether the undertakings to which they belong be for a commercial purpose or otherwise, are within the control and subject to the legislation of the Province in which they are situate, unless they are by the Parliament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

The Dominion Parliament cannot, without such declaration, authorise a company to establish in two or more Provinces works needing special legislative authority, and which are in their nature local in each Province, the jurisdiction in such case to give the needed authority being determined by the location and object of the works, and not by the circumstance that the company is authorised to make them in several Provinces.

A company was incorporated by Act of the Dominion Parliament for the purpose of establishing telephone lines in the several Provinces of the Dominion, but not of connecting two or more Provinces by telephone lines, nor was the undertaking declared to be for the general advantage of Canada or of two or more of the Provinces, and in the absence of these conditions it was held that the Act, so far as it professed to confer a right to erect poles in the streets of cities and towns was invalid.

The defendant, agent of the Bell Telephone Company of Canada, was indicted for illegally erecting three tele-

* Present—DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

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STATEMENT.

graph poles, in Buade Street, a leading thoroughfare in the city of Quebec, thereby obstructing the Queen's highway, to the common nuisance of the public.

The company was incorporated by Act of the Parliament of Canada, 43 Vict. c. 67, with power to establish telephone lines in the several Provinces of the Dominion, and to construct, erect and maintain lines along any public highway, street, bridge, watercourse or other such place, or across or under any navigable waters either wholly in Canada, or dividing Canada from any other country, " provided that in cities, towns and incorporated villages, the opening up of a street for the erection of poles or for carrying wires under ground shall be done under the direction and supervision of the engineer or such other officer as the Council may appoint, and in such manner as the Council may direct, and that the surface of the street shall, in all cases, be restored to its former condition by and at the expense of the company." This charter, and the consent of the city Council, duly obtained, were relied on by the defendant as a plea to the indictment; in the absence of these conditions the poles in question would undoubtedly constitute an obstruction and a nuisance.

It appeared that the business of the company, in connection with the objectionable poles, was of a purely local character and confined to the district of Quebec, and it was not declared by the charter to be an undertaking incorporated for the general advantage of Canada.

The jury, under direction of the Court, found a verdict of guilty, subject to the question reserved for the determination of the Court *in Banco* whether the said company had authority under their statute, or were otherwise authorized by law, to place the said poles in the said street; and if so, whether the Dominion Legislature had a legal right to grant such authority.

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RESERVED CASE.

STATEMENT.

The defendant Sigismund Mohr is put upon his trial upon an indictment for causing a public nuisance in Buade Street, in the city of Quebec, to wit: for having on the thirteenth day of December, 1880, and on divers days and times between that day and the taking of the inquisition on the said indictment, which the grand jury found a true bill on the second day of May, 1881, obstructed a certain street, called Buade Street, situate in the city of Quebec, in the district of Quebec, being the Queen's common highway, by unlawfully and injuriously putting, planting and erecting in said street, three posts or poles, commonly called telegraph poles, and ever since unlawfully and injuriously permitting, suffering and causing said poles to be and remain in and upon the Queen's highway aforesaid, whereby it was obstructed and straitened so that the Queen's liege subjects could not pass in said highway as they were wont to do with their horses and carriages, to the great damage and common nuisance of all Her Majesty's liege subjects going and returning in, through and upon the said Queen's highway, to the evil example of all others in like case offending and against the peace of Our Lady the Queen, her crown and dignity.

The private prosecutor, James Carrel, the Mayor, the City Engineer, the City Clerk and several other witnesses were examined in support of the prosecution, and two witnesses for the defence.

The result of the evidence went to shew that the defendant Sigismund Mohr, as agent and employee of the Bell Telephone Company in the month of December, 1880, placed three telegraph poles in Buade Street, in the city of Quebec, on the south side of the street, one opposite the office of the "Telegraph" newspaper owned

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and occupied by James Carrel, the private prosecutor, one opposite Renfrew's furriers' establishment, and the third at Poston's corner, further to the west. These posts were used by the Bell Telephone Company for placing their wires thereon, and for the purpose of communicating in the course of their business. The narrowest part of the street is opposite the "Telegraph" office, having there a width of only thirty-two feet, and the post placed at this point is let into the footpath which for the purpose is cut to the width of eighteen inches. The other two posts are placed in the street immediately outside the line of the footpath. The City Passenger Railway passes through the same street and terminates near the "Telegraph" office, which it passes. It is also placed on the south side of the street very near the footpath; when the car passes there is but a space of twelve inches between it and the post opposite the "Telegraph" office. These posts are an obstruction which diminish the free use of the street, particularly the footpath at the "Telegraph" office, which had a width of six feet now diminished to about four and a half feet by the erection of the telegraph pole at that point. Previously to its erection three foot passengers could pass abreast; since, only two can pass, and that with difficulty. The obstruction would be dangerous in case of runaway horses or persons attempting to get in or out of the city cars when in motion near the post.

The posts were so placed in Buade Street, by the defendant Sigismund Mohr, on behalf and by the instructions of the Bell Telephone Company, who for the purpose obtained the sanction and approval of the city corporation. The city engineer was first applied to and gave his sanction to have the posts placed on the north side of the street at points by him selected and pointed

out for the purpose; but the mayor noticing the work of placing them going on and differing in opinion with the engineer, as to the side of the street on which they should be placed, he stopped the work and had the matter referred to the city council, who adopted his view and ordered the posts to be placed on the south side whereupon the engineer selected the spots for placing, them but has himself retained the opinion that they would have caused less inconvenience on the north side. By purchasing rights from private proprietors, the company might have avoided placing the posts in the street. This course was recommended by the mayor, but was for the time found by the company to be impracticable. Stretching the wires on posts is the least objectionable way of using them in cities. Buade Street is a main thoroughfare between the Upper and Lower Town and is much frequented. In the district of Quebec, the Bell Telephone Company have extended their poles and wires from Bridgewater to Montmorency, and are using them for the purpose of their business in communicating within and between these points. They are incorporated under the statute of the Dominion Parliament, 43 Vict. c. 67, and placed the said three poles in said Buade Street, claiming that they had a right to do so under the authority given them by statute, under the direction and supervision of the city engineer or such other officer as might be appointed by the city council for the purpose, and the said municipal council and their engineer in sanctioning and approving as they did of the placing of these poles in the said street did so under the belief that the Bell Telephone Company were authorized and had a right under said statute to place said poles in said street, and that the said municipal city council and their engineer could exercise no further or greater functions in the matter than to supervise and direct as to the manner

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and localities in which said poles should be placed in said street, which supervision and direction they exercised.

On this state of facts the jury, under the direction of the Court, found a verdict of Guilty against the defendant, subject to the question reserved for the determination of the Court *in Banco* whether the said Bell Telephone Company had sufficient authority under said statute, 43 Vict. c. 67, or were otherwise authorized by law to place said poles in said street; and if so, whether the Dominion Legislature had a legal right to grant such authority.

(Signed) A. CROSS, J., B. R.

DORION, C. J.:—

In the distribution of the powers assigned respectively to the Dominion Parliament and to the Legislatures of each Province by the B. N. A. Act, 1867, the intention is throughout made apparent not only by the classification of subjects, but also by express enactment that to the Dominion Parliament should appertain the right to legislate on subjects which from their nature affect the interest of the whole Dominion, and that all matters of a local nature affecting but one of the Provinces, or a portion of a Province, are within the control of the Legislature of the Province affected thereby, unless excepted from this general rule by a special enactment. The powers so conferred by sections 91 and 92 of the Act are exclusive, so that within the limits assigned to the Dominion Parliament and to the Legislature of each Province, these powers are exclusive and as free from the control of the one over the other, as they are from the control of each of the other Provinces.

The power conferred by section 92 to make laws concerning the different subjects therein enumerated is exclusive and comprises "municipal institutions in the

Province," that is the establishment of local governments within the Province, "local works and undertakings" generally without any limitations as to whether such works constitute a commercial undertaking or not, "the incorporation of companies with Provincial objects," that is whose objects are to be carried out within each Province—"property and civil rights in the Province;" and to leave no doubt as to the intention of the Act this section 92 closes with the comprehensive declaration; "generally all matters of a merely local or private nature in the Province."

These general powers are limited in certain cases, as for instance, sub-section 29 of section 91 provides that the exclusive legislative authority of the Dominion of Canada extends to such classes of subjects [as are] expressly excepted in the enumeration of the classes of subjects exclusively assigned to the Legislature of the Provinces, as for instance Marine Hospitals, which are specially excepted by sub-section seven of section 92, "lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

"Lines of steamships between the Province and any British or foreign country:

"Such works as, although wholly situate within the Province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

Therefore all works wholly situate within one Province whether the undertaking to which they appertain be for a commercial purpose, or otherwise, no distinction being made, are within the control and subject to the legislation of the Province, in which they are made, unless they are,

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by the Parliament of Canada, declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

This power of the Provincial Legislature is further limited by section 91, in matters relating to the incorporation of banks, which although they may be local must be incorporated by the Dominion Parliament.

Under these provisions a bank may be incorporated by the Dominion Parliament to do business in the city of Quebec, or in the city of Montreal, or in both although within the Province of Quebec, but the Dominion Parliament could not authorize the establishment of a telegraph in the cities of Quebec or Montreal, nor within any two points within the Province of Quebec, unless it declared that such telegraph be for the advantage of the Dominion, or of at least two of the Provinces of the Dominion. For the same reason the Dominion Parliament could not authorize the establishment of a telegraph wholly within the Province of Ontario, or of any of the other Provinces, for such works and undertakings being entirely within each Province are expressely declared to be subject to the exclusive control and legislation of the Province within which they are established. If the Dominion cannot incorporate separate companies for the purpose of establishing separate lines of telegraph in one or two or more of the Provinces unless such lines are to connect two or more Provinces or extend beyond the limits of one Province, or are expressly declared to be for the advantage of the Dominion, or of two or more Provinces, it is because by their nature these separate telegraph lines are local works and undertakings subject to the exclusive control of the Provincial Legislatures.

And if the Dominion cannot authorize separate companies to establish such separate lines of telegraph, whence could it derive its authority to incorporate one company

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to establish those several works? It is evident that the nature and character of such undertakings cannot be altered from being local undertakings to become general by the mere fact that they are to be established by one company instead of several companies. Their character is determined by their location and object or by an express declaration of the Dominion Parliament, and not by the accident that the same company is authorized to make them all.

In considering the nature and character of the Bell Telephone Company, we must apply the same rules as are applicable to telegraph lines, they being of the same character, and therefore included in the general terms of "other works and undertakings," to be found in sub-s. 10 of section 92 of the Act.

From the case reserved by the learned judge who presided at the trial, it appears that the Bell Telephone Company have extended their poles and wires from Bridgewater to Montmorency, and are using them for the purpose of their business in communicating, within and between those two points, both of which are within the district and Province of Quebec.

It is true that by its Act of incorporation passed by the Dominion Parliament in the forty-third year of Her Majesty's reign, cap. 67, the Bell Telephone Company is authorized to establish telephone lines in the several Provinces of the Dominion, but the company is not incorporated for the purpose of connecting two or more Provinces by telephone lines, and it can therefore establish independent lines of telephone in each Province, not connecting the one with the other. Each such line would be a local work or undertaking, and subject to the Legislature of the Province in which it might be situated.

To give to the Dominion Parliament the power to

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authorize the Bell Telephone Company to impede circulation and traffic in the streets of Quebec, one of two conditions would have been required; either the company should have been incorporated for the purpose of connecting by telephone lines the Province with any other or others of the Provinces of the Dominion, or of extending its line of telephone beyond the limits of the Province of Quebec; or it should have been declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

Neither of these conditions existing, it follows that the Parliament of the Dominion had no authority to confer on the Bell Telephone Company the right to erect telegraph poles in the streets of the city, which at common law are such an impediment as to be adjudged by a petty jury to be a nuisance. It is not necessary to decide whether or not the whole Act of incorporation is *ultra vires*, it is sufficient for this case that the authority given to erect telegraph poles in the streets of the city of Quebec be *ultra vires* to maintain the conviction pronounced against the defendant by the petty jury.

There could have been no public nuisance committed by the company, nor by its officers, in erecting their telegraph poles, according to the directions provided for by law, if the authority to do so had been conferred by the proper legislative body; but the law being *ultra vires*, the company had no special authority to erect poles in the streets, and it was a question of fact to be determined by the jury whether in doing it, it had so obstructed the use of the street as to commit a nuisance. *The Commonwealth of Massachusetts* v. *The City of Boston* (1).

(1) Allen Telegraph Cases, 365.

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The verdict must therefore be affirmed, and this is the unanimous judgment of the Court.

CROSS, J.:—

To determine the questions submitted, one must necessarily pass in review the provisions of the B. N. A. Act, 1867, Imperial Statute, 30 Vict. c. 3, distributing legislative powers between the Dominion and the Provincial Legislatures.

Section 91 attributes to the Dominion Parliament the power of making laws in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces.

If the rule thus laid down remained unqualified, the division of powers to a certain extent would be comparatively easy, because section 92, by declaring that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereinafter enumerated, would require only the due consideration of the subjects so enumerated, an accurate appreciation of the latitude to which they might be fairly carried, and their complete exclusion from the powers assigned to the Dominion Legislature, to leave within the exclusive domain of the latter the entire remaining legislative authority, and thus arrive at a principle of division not difficult of application, save in the measure of latitude to be given to the different classes of subjects delegated to the Provincial Legislatures in appreciating which it would have to be borne in mind that the special powers to the full extent of their significance should exclude the general, and consequently trench upon and take away from the otherwise unlimited power of the Dominion Legislature all the authority included in the terms of the special attributions.

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But by proceeding with the reading of section 91, it will be found that this simple rule of construction becomes modified, and although it continues to have a general bearing on the whole subject, it is evident that the purpose of the Legislature could not have been carried out, without the introduction of provisions which materially vary its general scope; hence the clause in question continues to declare that, for greater certainty, but not so as to restrict the generality of the terms therein used, the exclusive legislative power of Parliament extends to all matters coming within the classes of subjects enumerated in connection with that section, so that we have a series of special powers attributed to each of the respective Legislatures, some of which may have very indefinite limits, and some of which in each series may be found in their extension to overlap and interfere with the extension of some in the other series, those not included in either falling of course to the jurisdiction of the Dominion Parliament, including those specially excepted in the enumeration of powers attributed to the Local Legislatures.

There being thus afforded chance of mutual encroachment, it becomes necessary in such case to adopt a rule whereby it can be decided whether a particular law is or is not *ultra vires* of the Legislature which enacted it, and perhaps for this purpose, when it is found that the main object of a law is clearly within the power of the Legislature that enacted it, what it contains as mere incidents, if essential to its operation, should not be readily treated as *ultra vires*, although such provisions may seem to invade the powers of the other Legislature, unless clearly in opposition to the letter of the statute.

Again there are powers common to, and included in the attributions of both Legislatures, depending chiefly upon the facts as to whether the object of the law be of

a local or general nature, and telegraphs are especially of this character.

Number 10 of section 92 includes within the powers of the Local Legislatures "local works and undertakings other than such as are of the following classes:—

"*a.* Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:

"*c.* Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

As no such declaration as that last mentioned appears to have been made regarding the undertaking of the Bell Telephone Company, this provision cannot apply, but the exception contained in the provision in letter "*a*" is applicable, implying that the Provincial Legislatures cannot establish telegraphs connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province, leaving it to be inferred that they can establish telegraphs within their respective Provinces, provided that they are works of a local nature; and leaving it equally to be inferred that the Dominion Parliament can establish telegraphs, provided they are works of a general nature applicable to the whole Dominion, or more than one of its Provinces: and inasmuch as the Dominion Parliament are given the regulation of navigation and shipping it may be a question whether the Local Legislature could grant to such a company the power to carry their works over a navigable river.

With these observations made, I propose now to come directly to the question submitted, which in effect is,

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whether the Dominion Statute, 43 Vict. c. 67, the charter of the Bell Telephone Company, authorized that company to place the three telegraph poles complained of, in Buade Street, and whether by granting such authority the Dominion Parliament exceeded its powers.

Among other powers, section 2 of that Act authorized the company to build, establish, construct, maintain and operate any line or lines for the transmission of messages by telephone in Canada or elsewhere, and to make connection with any line or lines of telegraph or telephone companies in Canada or elsewhere.

By section 3, the Company was authorized to construct, erect and maintain its line or lines, along the line or lines of any public highway, streets, bridges, water-courses, or other such places, or across or under any navigable waters, either wholly in Canada, or dividing Canada from any other country; and by section 4, the company was authorized to purchase or lease, any telephone line in Canada or elsewhere.

It is obvious that the Dominion Parliament did, by the charter in question, authorize the placing of poles in public streets, and consequently in Buade Street, in the City of Quebec, the same as in any other street, on condition always of conforming to the charter. Did the Dominion Parliament exceed its authority in granting such a charter?

To my mind, there could be no doubt of the power of the Dominion Parliament to authorize the establishment of a general system of telegraphy throughout the Dominion, extending from British Columbia to Nova Scotia, and that lines even of a local character for connecting Provinces or crossing navigable rivers, to be legal should have the stamp of their authority, which would be sufficient in either of the cases mentioned, without the necessity of invoking the provision contained in sub-

section "*c*" of No. 10 of section 92 of the B. N. A. Act, and declaring the particular work to be for the general advantage of Canada, or of two or more Provinces; a provision by which they might deprovincialize any local work. To my mind, it is equally clear, that the charter contained in the statute, 43 Vict. c. 67, is not *ultra vires* of the Dominion Parliament, and if the Bell Telephone Company had conformed to it, they had a perfectly legal charter; but did they conform to it in such a manner as to be able to invoke its protection?

It has been made a question whether the telephone, not invented until after confederation, should be considered in the same category as telegraphy. It differs in this, that the one communicates intelligence by sounds, the other by marks, one is speaking, the other writing; the former being more in the nature of local, from its circumscribed operation, consequent on the limited distance to which the voice can be carried. Nevertheless both have been, by decisions in the United States, included, and perhaps reasonably so, in one class, as modifications of communication by electricity. The parties in this case seem to have accepted this principle without objection, and the question whether the undertaking is of a local or general nature is not affected by this consideration.

It is obvious from the proof, as stated in the reserved case, that the establishment of the undertaking of the Bell Telephone Co., in the district of Quebec, is one purely of a local character, intended to serve local purposes, chiefly for the convenience of the city; it extends beyond its limits, but not even out of the district, and has no pretensions to connect Provinces, or even to cross navigable rivers. Being a local work, it is unauthorized by the Dominion charter, and is not such a work as that charter contemplates. If it be thereby literally autho-

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rized, it is of such a nature as to be *ultra vires* of the Dominion Legislature.

The placing of telegraph poles in the streets of a city must of necessity straiten or diminish the free ordinary use of such streets for traffic and circulation. It is consequently, if unauthorized by competent legal authority, a nuisance at common law. If authorized by such authority it ceases to be a nuisance, and takes the position of a franchise or privilege.

In the case of *Regina* v. *The United Kingdom Electric Telegraph Co.* (1), an unauthorized company was held to have committed a common nuisance, by placing telegraph poles in an ordinary country road, being a Queen's highway. The abstract note of the reporter as to the holding is as follows:—"A permanent obstruction, such as the posts of a telegraph erected on a highway, and placed there without lawful authority, whereby the way is rendered less commodious to the public than before, is an unlawful act and amounts to a nuisance, and the circumstance that the posts were not placed upon the repaired and metalled part of the highway nor upon an artificially formed foothpath, but on the waste on each side of the way, makes no difference, even though a jury might be of opinion that a sufficient space for the public use remained unobstructed." And in the case of the establishment of the Bell Telephone Co., in the district of Quebec, being a local work, falling exclusively within the jurisdiction of the Local Legislature, it could not be authorized by a charter from the Dominion Parliament, purporting to grant authority for a general undertaking for the whole Dominion, or for the advantage of two or more Provinces; such general undertaking being alone within the competency of the Dominion Parliament, by the form of charter adopted. The

(1) 9 Cox, C. C., 174; Allen Telegraph Cases, 180.

placing of the telegraph poles in Buade Street was consequently a common nuisance, and the verdict should stand.

An argument might be used, which has not been pressed in this case, that the right to regulate telegraph and telephone companies pertains to the Dominion Parliament as a part of "trade and commerce." On this ground, it appears that in the United States they have been decided to be under the Federal power. (See Doutre's work on the Constitution of Canada, page 237, and the cases there cited;) but this reasoning, if of any force, would prove too much, as by transference to the particular class of "trade and commerce," it would place them within the exclusive jurisdiction of the Dominion Parliament, when, in so far as they are local works, they are manifestly attributed to the local authority by No. 10 of section 92, B. N. A. Act.

There is some authority for their not being considered within the power of the Local Parliaments when their object includes the going out of a Province, or the crossing of a navigable river; for instance, by reference to the work last quoted, page 234. An extract is there given from the Sessional Papers, 1877, No. 89, page 87. On the 4th December, 1874, the Minister of Justice concurred in a report of his deputy, advising the Governor-General to disallow an Act of the Nova Scotia Legislature, incorporating certain persons under the name of "The Anglo-French Steamship Co." for the purpose of running a steamer or steamers to and from ports in Nova Scotia, the Island of St. Pierre Miquelon and Newfoundland, on the ground that it was shewn on the face of the Act, that it incorporated a line of steamships extending beyond the limits of the Province, and between the Province and a British port, as also a foreign country, and that it obviously came within one of the classes

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mentioned in the B. N. A. Act, sec. 92, sub-s. 10, classes "a" and "b."

On the 25th March, 1875 (Sess. Papers 1877, No. 89, page 84), the Minister of Justice concurred in a report of his deputy, advising the disallowance of another Act of the same Legislature (N. S.), c. 82 of 1874, entitled: "An Act to incorporate the Eastern Steamship Co.," which stated that the company would be entitled to run steamers on the coast of the Province and *elsewhere*, the disallowance being suggested for the same reason.

An Act passed by the Legislature of Nova Scotia in 1874, entitled: "An Act to incorporate the Halifax Company (Limited)," giving rights to cross rivers without reference to the rights of navigation, was disallowed by the Governor-General, as not being for purely local works or undertakings, nor an Act for the incorporation of a Company with provincial objects merely, or objects of a merely local or private nature in the Province, but for objects beyond the power of a Local Legislature. (Dom. Sess. Papers, 1877, No. 89, page 86.)

If these be accepted as authority, it would strengthen the opinion that the charter of the Bell Telephone Co. is valid, and only required the establishment thereunder of such works as were of a character to be Dominion works, of a general nature or utility, or connecting Provinces, or crossing navigable rivers, to entitle the company to avail themselves of its protection and privileges; but that the establishment of a purely local work, within one Province, did not entitle them to the benefit of the Act.

Verdict sustained.

J. O'Farrell, R. J. Bradley and *Jules Tessier*, for the private prosecutor.

Irvine, Q.C., and *Pemberton*, for the defendant.

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

HON. L. O. LORANGER, Atty.-Gen.....*Appellant;*

v.

THE COLONIAL BUILDING & INVESTMENT ASSOCIATION.....*Respondents.*

1882*
March 24.

Powers of Dominion Parliament—Property and civil rights—Matter of a merely local or private nature—37 Vict. c. 103, D.

The Dominion Parliament has no power to incorporate an association for the purpose of buying, leasing, and selling landed property and buildings, the operations of a society for such purpose affecting exclusively property and civil rights within the Province where they are carried on; and therefore the Act 37 Vict. c. 103, incorporating the Colonial Building and Investment Association for such objects, was held to be *ultra vires*, though power was given by said Act to carry on operations throughout the Dominion.

MONK, J., dissenting.

This was an appeal from a judgment rendered by the Superior Court at Montreal (Caron, J.), on the 9th July, 1881, dismissing the petition of the appellant.

The question was whether the Federal Parliament exceeded its powers in granting a charter to the company respondent, whose operations and business, it was alleged, were limited to the Province of Quebec, and were of a purely local or private nature.

Mr. *Girouard*, Q.C., for the appellant, submitted that the Colonial Building and Investment Association, the respondents, acted as a corporation within the Province of Quebec exclusively, and that their business was build-

*Present:—DORION, C. J., MONK, TESSIER, CROSS, and BABY, JJ.

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ing, buying, leasing, and selling landed property and buildings, and lending money on the security of mortgage on real estate in the Province; that the operations of the company had been limited to the Province of Quebec, and were of a local or private nature, affecting property and civil rights in the Province, and therefore the Association could not be legally incorporated except by the Legislature of the Province of Quebec. The incorporation, however, had been effected not by Provincial Act, but by an Act of the Parliament of Canada, in 1874 (37 Vict. c. 103), which, it was submitted, was *ultra vires*, and null and void. The present petition had been presented at the solicitation of John Fletcher, of Rigaud, a holder of forty-seven shares in the capital stock of the Association, of $1,000 each, transferred to him by William Rodden, one of the promoters of the Association. The prayer of the appellant was that the Association be adjudged and declared to have been illegally incorporated, and that it be declared dissolved. The only witness examined was the secretary of the Association, W. L. Maltby, whose evidence showed that the operations of the Association had been confined to Montreal and its vicinity, and that, owing to the depression of business, no steps had been taken for the extension of the business in other parts of the Dominion. Mr. *Girouard* cited *L'Union St. Jacques* v. *Belisle* (1), *McClanaghan* v. *St. Ann's Mutual Building Society* (2), *Reg.* v. *Mohr* (3), *The Queen Insurance Company* v. *Parsons* (4).

Mr. *Robertson*, for the respondent, said the petition did not allege that the Dominion Parliament had not power to grant the charter, but merely set out that the

(1) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63. (2) 3 L. N. 61; *ante*, p. 237.
(3) 7 Q. L. R. 183; *ante*, p. 257. (4) 7 App. Cas. 96, 116; *ante*, vol. 1, p. 265.

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business had so far been of a local nature, and that the Association should therefore be restrained and dissolved. The real question, however, was whether the Federal Parliament had power to grant the charter, for, if it had been legally chartered, the mere fact that it had not so far availed itself of all its powers would offer no ground for declaring it illegally incorporated. Now, it would be seen that the powers conferred by this charter were not such as could be asked from or granted by the Local Legislature. Power was given to deal in all kinds of securities, stocks, bonds, or debentures, to act as an agency and trust company; to issue and negotiate bonds, etc.; and by section 11, the Association was authorized to establish offices or agencies in London (England), New York, and any city or town in the Dominion. The Act authorized operations which would involve commercial relations with persons in all the Dominion, and gave the Association the right to carry on commercial business. The Judge in the Court below was therefore right in declaring that the Act in question referred to trade and commerce, and was within the jurisdiction of the Federal Parliament. Reference was made to two Acts passed recently by the Dominion Parliament after full discussion in Committee—one to enlarge and extend the powers of the "Crédit Foncier Franco-Canadien," a company incorporated by the Provincial Legislature, and the other an Act to incorporate the "Crédit Foncier of the Dominion of Canada," the objects of which were almost identical with those of the corporation respondents. It was also pointed out that this action was really in the private interest of a shareholder—Mr. Fletcher—who was endeavouring to evade payment for the stock subscribed by him.

MONK, J. (*diss.*), was of opinion that the judgment

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should be confirmed. The fact that the society had not yet used all its powers, was not a reason for its dissolution.

The judgment of the Court is as follows:—"Considering that the operations which appear to have been carried on by the company respondents, have been so carried on exclusively within the Province of Quebec, and have been of the nature and description following, to wit: the buying, leasing, and selling of landed property, buildings and appurtenances thereof, the purchase of building materials to construct villas, homesteads, cottages and other buildings and premises, and the selling and letting the same, and the establishment of a building or subscription fund for investment or building purposes, and acting as agents, which operations have been confined to the city of Montreal and its vicinity, within the said Province of Quebec; considering that said operations have been in their nature local and Provincial, and for Provincial objects, affecting exclusively property and civil rights within the said Province, therefore not within the control or jurisdiction of the Dominion Legislature, but such as the Legislature of the Province of Quebec alone could, under sub-sections 11, 13 and 16 of section 92 of the B. N. A. Act of 1867, deal with, and such Legislature of the Province of Quebec only had the right to incorporate a company to carry said objects into effect, and that to the exclusion of the Dominion Legislature; considering that said company respondents have not been incorporated by the legislature of the Province of Quebec, nor under or by virtue of any law in force in the said Province, but have assumed and carried on operations in the said Province under an Act of incorporation of the Dominion Parliament passed in the thirty-seventh year of Her Majesty's

reign, being c. 103, the said Dominion Parliament having no right to incorporate a company with power to carry out such objects; considering that by the laws in force in the Province of Quebec, corporations are not entitled to acquire or hold immovable property unless thereto authorized by some special law emanating from a legally constituted authority having power to make such law, and the respondents have not shewn that any special law or authority sanctioned by law exists to entitle them to hold or possess real or immovable property within the Province of Quebec; and considering that there is error in the judgment rendered in this cause by the Superior Court sitting at Montreal on the 9th day of July, 1881, doth reverse, annul, and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth adjudge and declare that the said company, respondents, had and have no right to act as a corporation for or in respect of any of the said operations of buying, leasing or selling of landed property, buildings and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid or any like affairs, or any matter of property or civil rights, or any objects of a purely local or Provincial nature, in any manner or way within the said Province of Quebec, and doth prohibit the said company respondents from acting as a corporation within the said Province of Quebec for any of the ends and purposes aforesaid, and this Court doth further condemn the said company to pay the appellant the costs as well of the Court below as of the present appeal."

QUEBEC COURT OF QUEEN'S BENCH—APPEAL SIDE.

1882*
Oct. 7.

THE CORPORATION OF THREE RIVERS.....*Appellant;*

v.

SULTE.....*Respondent.*

[*Reported 5 Legal News, 330.*]

Intoxicating liquors, power to prohibit sale of—Municipal Institutions—B. N. A. Act. s. 92, sub-sec. 8—38 Vict. c. 76, Q.

The state of things existing in the confederated Provinces at the time of Confederation, and more particularly that which was recognised by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act.

At the time of Confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities under the laws in force respecting municipal institutions in the then Province of Canada and in Nova Scotia, and consequently is to be deemed included in the provision as to "municipal institutions" contained in sec. 92, sub-s. 8, of the B. N. A. Act.

The Provincial Legislatures have the power for the purposes of municipal institutions to pass a prohibitory liquor law or a liquor law which is prohibitory except under certain conditions; this power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion.

RAMSAY, J.:—

The evidence in this case is formal and gives rise to no difficulty. Two questions come up on this appeal:

1st. Is the corporation, appellant, authorized to pass

*Present:—DORION, C. J., MONK, RAMSAY, TESSIER, and BABY, JJ.

the by-law of the 3rd April, 1877, under the local legislation, so far as that Legislature can authorize?

2nd. Has the Local Legislature such right?

With regard to the first of these questions, it appears that, on the 3rd of April, 1877, an amendment was passed to a by-law made in 1871 regulating that a license fee of $200 should be paid by any one authorized to retail liquors, before the certificate of the corporation to enable the party to obtain a license was granted. The statute under which this by-law is justified is the 38 Vict. c. 76, s. 75 (2), by which it is provided that "the said council shall have power to make by-laws:

"1. . . . . .

"2. For determining under what restrictions and conditions, and in what manner the collector of inland revenue for the district of Three Rivers, shall grant licenses to merchants, traders, shopkeepers, tavern-keepers, and other persons to sell such liquors."

This seems clear enough, but it is said that the License Act of 1878 limited the powers of the corporation. By section 36 of that Act (41 Vict. c. 3, Q.) it is enacted that "on each confirmation of a certificate, for the purpose of obtaining a license for the cities of Quebec and Montreal, the sum of $8 is paid to the corporation of each of those cities; and to other corporations for the same object, within the limits of their jurisdiction, a sum *not* exceeding $20 may be demanded and received."

Section 37: "The preceding provision does not deprive cities and incorporated towns of the rights which they have by their charters or by-laws."

It is probable that the Legislature intended to say that, "the preceding provision does not deprive incorporated cities and towns of the rights which they may have under any by-law made in conformity with their respective charters." It may be further said in support of this

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reading of the statute, that the general principle is that special laws are not presumed to be repealed by general ones unless they are incompatible or expressly repealed. In so far, then, as incorporated towns, other than Quebec and Montreal, are concerned, it seems to leave in force any by-law then existing, made in conformity with a special charter. Therefore, as the by-law was made in 1871 and amended in 1877, a year before the 41 Vict., the proviso of sec. 37 excepts these by-laws from the provision of sec. 36. Whether a new by-law made subsequent to 1878 would be so covered, it is not now necessary to decide.

As to the second question: Sub-section 9 of sec. 92 of the B. N. A. Act, gives the Local Legislatures the right to make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes." The statute does not say that the Local Legislatures can only oblige shopkeepers, etc., to take out a license, but that they may make laws "in relation to" such licenses. That is a distinction which seems to have escaped observation in the case of *Angers* v. *The Queen Ins. Co.* (1) probably because the pretension of the Quebec Government was that the impost was in the nature of a license, and being for the purpose of raising revenue for the Province it was thought to be within the powers of the Local Legislature. Here the question is simpler. The Local Legislature has the power *exclusively* to legislate in relation to shop, saloon, tavern, auctioneer and other licenses, provided it be for the purpose of raising a revenue for provincial, local or municipal purposes. It has no authority *under this sub-section* to go further.

The statute cited in the case under our consideration is not an authorization to the municipal council to tax

(1) *Ante*, vol. 1, p. 117.

by way of license, but an Act allowing the municipality to put restrictions generally on the sale of liquors. It is true the by-law has given to this prohibition the effect of raising revenue for municipal purposes; but this will not cure the want of jurisdiction of the statute, for a statute *ultra vires* does not remain in force for a part, because some fractional part is within the powers of the Legislature, unless it appears that the subject beyond the powers of the Legislature is perfectly distinct from that within, and that each is a separate declaration of the legislative will. This is not the case here. We think, therefore, so far as sub-sec. 9, s. 92, of the B. N. A. Act is concerned, it does not justify the statute in question. As the case was referred to at the argument, it may be well to remark that the decision of the Supreme Court in *Severn* v. *The Queen* (1), is not in point in this case. We are not therefore called upon to discuss the ingenious application of the doctrine of *ejusdem generis* to the classes of matters which the Local Legislatures may license, nor to decide what the *genus* is which includes an "intelligence office" and excludes a "brewer"

But we have still to determine another question, whether sub-sec. 8 does not cover the exercise of the power assumed by the Legislature of Quebec.

It may be at once conceded that the power to pass prohibitory liquor laws is not essential to the existence of municipal institutions, and that consequently in a very restricted reading of sub-sec. 8, it would not justify the Local Legislature in passing a prohibitory liquor law. But, it may fairly be asked, whether it was the intention of the Imperial Parliament in an enumeration of this sort to confine "municipal institutions" to those matters only which are of the essence of municipal institutions? If such was the intention of Parliament, a wide field for

(1) 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.

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speculation was left open, or it was contemplated to restrict municipal institutions within very narrow limits. It would seem, however, we have not to determine what institutions are essential to municipal existence in the abstract, but the meaning of the term at the time of Confederation. In so far as the Province of Quebec is concerned, municipal institutions were the creation of special statutes. The general Act was passed no longer back than 1855. It was introduced under the title of "The Municipal and Road Act." Roads and their maintenance, bridges, ferries, fords, prevention of abuses prejudicial to agriculture, police regulations, and many other matters were subjected to municipal control. Among other things county councils were given the power to make by-laws "for prohibiting and preventing the sale of all spirituous, vinous, alcoholic and intoxicating liquors, or to permit such sale subject to such limitations as they shall consider expedient;" "for determining under what restrictions and conditions, and in what manner the revenue inspector of the district shall grant licenses to shopkeepers, tavern-keepers, or others, to sell such liquors." (See Con. Stat., L.C., cap. 24, sec. 26, subss. 11 and 12.) In 1857 the City of Three Rivers was incorporated, and as the Municipal and Road Act was repealed as far as it affected or might affect Three Rivers, the two sub-sections 11 and 12, above quoted, were re-enacted in precisely the same words for the new incorporation. (See 20 Vict. c. 129, s. 37, foot of p. 493 and p. 494.) These statutes were in force at the time of Confederation.

In 1858 an Act was passed, styled "An Act respecting the municipal institutions of Upper Canada;" and in that Act powers similar to those just enumerated as being accorded to Lower Canada and to Three Rivers particularly, were given to municipalities in Upper

Canada. (See Con. Stat., U. C., c. 54, s. 246.) And this legislation was also in force up to the time of Confederation.

By the municipal system in force in Nova Scotia, prohibitory powers were possessed by the municipal authorities. (See Rev. St. N. S., c. 133, vi.)

As to New Brunswick, we have not found any statute conferring such powers; but at any rate we have the two great Provinces of Confederation, and one of the smaller ones, persistently including amongst municipal institutions the right to prohibit the sale of strong drink. We cannot help thinking that this was sufficient to bring prohibitory liquor laws within the powers of local legislation as forming part of "municipal institutions" within the meaning of the B. N. A. Act. With Chief Justice Richards, we think that we ought to look "at the state of things existing in the Provinces at the time of passing the B. N. A. Act, and the legislation then in force in the different Provinces on the subject, and the general scope and object of Confederation then about to take place" (1), when determining the value of indefinite terms in the Act. But in the case of *The City of Fredericton* v. *The Queen* (2), it was decided by the Supreme Court that the Dominion Parliament has *alone* the power to pass a prohibitory liquor law. It is true this decision goes somewhat beyond the real issue, which is as to the right of the Dominion Parliament to pass a prohibitory liquor law, which is quite a different thing. Still, we presume the point was fully argued before the Court.

It may be well to mention for the sake of precision, which, in quoting judgments, is of more importance than the multiplicity of references, that the question in *Cooey* v. *Brome* (3), was not whether the Local Legislatures

(1) [*Severn* v. *The Queen*, 2 Can. S. C. R. p. 97; *ante*, vol. 1, p. 440.]
(2) 3 Can. S. C. R. 505; *ante*, p. 27. (3) 21 L. C. J. 182; *post*.

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could pass a prohibitory liquor law, but whether the prohibitory law of the old Province of Canada was still in force. We were all of opinion that it was. This decision, then, was so far exactly similar to the decision in *Sauvé* v. *The Corporation of Argenteuil* (1), and in the cases of *Hart* v. *Missisquoi* (2), and *Poitras* v. *The City of Quebec* (3), except that in the two last cases the Judge expressed the opinion that if the Temperance Act of 1864 had been repealed by the Local Legislature, he would have held that the Local Legislature could not have re-enacted it. Incidentally, in *Cooey* v. *Brome*, Chief Justice Dorion expressed a different opinion; and as a general proposition, I may say, parenthetically, I do not see how a Legislature has power to repeal what it cannot re-enact. Of course, it may sometimes indirectly do so, or do what will have a similar effect. The reversal of *Cooey* v. *Brome* in this Court was not, however, on this question at all, but on the question of whether the by-law had been lawfully voted; so it appears that the consent reversal arrangement in the Supreme Court, of which we have heard something, signifies even less than was at first supposed. By not taking the state of things existing in at least three of the Provinces at the time of passing the B. N. A. Act and the legislation then in force, we arrive at the inconvenient conclusion that the municipal institutions, as they existed prior to Confederation, cannot be maintained by local legislation; and that, as in the present case, a municipality would be shorn of most useful powers, by the simple operation of a surrender of its charter, in order that the legislation may, for convenience sake, be amended or consolidated. It is maintained that to renew these powers there must be joint legislation, if that be lawful, which is open to some doubt.

(1) 21 L. C. J. 119. (2) 2 Q. L. R. 170; *post*, p. 382.
(3) 9 Rev. Leg. 531; *post*, p. 376, n.

The consequences of arriving at such a conclusion compel us to look for some other mode of dealing with the statute. Since this case was argued, we have seen a decision of Chief Justice Meredith, in the case of *Blouin* v. *The Corporation of Quebec* (1), in which the case of *The City of Fredericton* v. *The Queen* is reviewed. The case of *Blouin* does not involve the qustion now before this Court, but the Chief Justice drew attention to a distinction between the case before him and that before the Supreme Court, which has been frequently recognised, and which it is important to keep in view; namely, that where a power is specially granted to one or other Legislature, that power will not be nullified by the fact that, *indirectly*, it affects a special power granted to the other Legislature. This is incontestable as to the power granted to Parliament (sect. 91 last *alinea*, B. N. A. Act), and probably it is equally so as to the power granted to the Local Legislature. In other words, it is only in the case of absolute incompatibility that the special power granted to the Local Legislature gives way.

As an example of the application of this principle, and also as an authority bearing on the present case, we may refer to the case of *Poulin* v. *The Corporation of Quebec* (2), where Chief Justice Meredith held that "the Provincial Legislatures, under the power given to them, may, for the preservation of good order in the municipalities which they are empowered to establish and which are under their control, make reasonable police regulations, although such regulations may to some extent interfere with the sale of spirituous liquors." And so he held that the provisions of a statute, "ordering houses in which spirituous liquors, etc., are sold, to be closed on Sundays, and every day between eleven o'clock of the night until five of the morning, are police regula-

(1) 7 Q. L. R. 18; *post*, p. 368. (2) 7 Q. L. R. 337.

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tions within the power of the Legislature of the Province of Quebec." That case came up to this Court and the judgment was confirmed. It supports the theory that a prohibitory liquor law may be within the powers of a Local Legislature, and it limits the generality of the doctrine of *The City of Fredericton* v. *The Queen*, that Parliament can *alone* pass a prohibitory liquor law.

It may be useful, and it is certainly fair, to remark that Chief Justice Meredith argues that his decision in the *Poulin Case* is not absolutely incompatible with the decision in the case of the City of Fredericton. Be this as it may, the case of *Poulin* does not decide that there may not be a prohibitory liquor law of such a character as to be really an interference with trade and commerce rather than a police regulation. Neither have we to decide that here, for we can see no distinction in principle between this case and that. *Poulin's Case* limits the time during which spirituous liquors may be sold in Quebec, the by-law under the statute controls the class of persons who shall be allowed to sell them by the far from novel device of a tax. This tax is in the sense of sub-section 9, which therefore, to some extent, justifies the action of the corporation, although sub-section 9 cannot be said to be the basis of the law, as was shewn at the beginning of this note.

We hold, then, that under a proper interpretation of sub-section 8, the right to pass a prohibitory liquor law for the purposes of municipal institutions, has been reserved to the Local Legislatures by the B. N. A. Act.

We have suspended our judgment in this case for an unusual length of time, awaiting the decision of the Privy Council in the case of *Russell* v. *The Queen* (1), in the hope that we might find some rule authoritatively laid down which might help us in adjudicating on this

(1) 7 App. Cas. 829; *ante*, p. 12.

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case and in that of *Hamilton* v. *The Township of Kingsey*. In this we have been, to some extent, disappointed. Their Lordships have remained strictly within the issues submitted to them, and have held that the Canada Temperance Act of 1878 does not interfere with sub-sections 9, 13 and 16 of section 92 of the B. N. A. Act; but that it is an Act dealing with public wrongs rather than with civil rights, and that it is a matter of general and not merely of a local or a private nature in the Province, and that if it affects the revenues of a Province it is only incidentally. We need hardly say that this is only a very brief summary of their Lordships' argument, but their reasoning will command general assent, not only owing to the source from which it comes, but also from its cogency. The Judicial Committee then lays down that the Dominion can pass a general prohibitory liquor law; it has specially declined to lay down any rule as to the other sub-sections than those submitted and the one alluded to by Chief Justice Ritchie; and therefore it has not either expressly or by implication maintained that the Dominion Parliament can alone pass a prohibitory liquor law, or rather a liquor law which is prohibitory except under certain conditions, as, for instance, subject to a license for the purposes of the revenue.

It may perhaps be said that, allowing the Local Legislatures to interfere in the prohibition of the sale of liquor, Parliament having generally dealt with the subject, might be inconvenient. In the particular case, we think no inconvenience is to be apprehended; but, even if it were otherwise, we should not be disposed to think an argument based on such an objection conclusive. The true check for the abuse of powers, as distinguished from an unlawful exercise of them, is the power of the central Government to disallow laws open to the former

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reproach. Probably to a certain class of mind this interference appears "harsh" and provocative of "grave complications," as has been said; but this is hardly an argument in favour of the Courts extending their jurisdiction to relieve the central Government of its responsibility. It seems to be fairer to leave the rule of expediency to be applied by a body responsible to the people at large, rather than to a comparatively irresponsible body like a Court. We are therefore to reverse the judgment in this case, with costs.

Judgment reversed.

QUEBEC COURT OF QUEEN'S BENCH—CROWN SIDE.

1872
March 14.

*DAVID H. POPE .....*Appellant,*

v.

JOHN GRIFFITH .....*Respondent.*

[*Reported 16 L. C. Jurist, 169.*]

Criminal Procedure—Crime—B. N. A. Act, s. 91, sub-s. 27.

A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.

Breach of a Provincial Statute is not a "crime" within the meaning of s. 91, sub-s. 27, of the B. N. A. Act.

In this case the appellant had been summarily convicted by two Justices, under ss. 4 and 5 of the Quebec License Act, for that he did, at the Township of Hatley, on the 8th of January, 1872, at the inn (a place of public resort) occupied by him in Hatley aforesaid, unlawfully keep and suffer to be kept and have in his possession, for retail at said inn, a quantity of spirituous liquors, without having a license to that effect, and was condemned to pay a penalty af $20 and costs, and, in default of immediate payment, to be committed to gaol for three calendar months, unless said fine, etc., should be sooner paid. The appellant deposited the amount of the penalty and costs, as required by section 195 of the License Act, and appealed to the Court of Queen's Bench, discharging the functions of the Court of Quarter Sessions, there being no Court of Quarter Sessions in the District of St. Francis.

[*This and the three following case, as they relate to the same subject, are printed together, and in their chronological order.]

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STATEMENT.

The points urged by the appellant were that the conviction was not supported by the evidence, that there was no proof that the appellant kept liquors for sale by retail, or otherwise, and that sections 4, 5, 142, 152, 161 and 166 of the License Act, in virtue of which sections the appellant had been convicted, were illegal and null, and that the Legislature of the Province of Quebec was not authorized or empowered to enact these sections, which are in excess of the powers conferred by the B. N. A. Act, 1867, upon Local Legislatures, which have no power to alter or amend the mode of procedure or the laws of evidence in criminal matters, or to alter the criminal law of this Province, nor to prescribe the mode by which the appellant should be tried for the alleged offence committed by him, and that the said Legislature could not give to the Justices the power of trying said offence in a summary manner. The appellant referred to section 91 of the B. N. A. Act, 1867, which gives to the Dominion Legislature exclusive legislative authority over "the criminal law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters."

After argument, the Court expressed a doubt whether an appeal existed from a conviction rendered under the Quebec License Act; and a re-hearing was had upon this point; when the appellant's counsel referred to the Dominion Statute 32-33 Vict. c. 31, s. 65, amended and altered by 33 Vict. c. 27, s. 1, which provides for appeals from summary convictions made by Justices out of sessions; also to section 195 of the License Act, which prescribes the conditions necessary to be complied with before an appeal can be allowed, and to section 150 of the same Act, which provides that such provisions of c. 103 of the Consolidated Statutes of Canada as are not inconsistent with the License Act

shall apply to all prosecutions instituted thereunder. Also to Con. Stat. C., c. 103, ss. 65, 66.

Mr. *G. H. Borlase* for appellant.

Mr. *J. S. Sanborn*, Q.C., for respondent.

RAMSAY, J.:—

This case comes before this Court, exercising the jurisdiction of a Court of General Sessions, on an appeal from a conviction by two Justices under the License Act of this Province. . . . . .

The conviction is under s. 4, 34 Vict. c. 2, of the Statutes of Quebec. The complaint is that appellant did unlawfully keep and suffer to be kept and had in his possession, at the inn occupied by him, being a place of common resort, for sale by retail, certain spirituous liquors, without having a license.

The grounds of the appeal are substantially that the conviction is not supported by the evidence, and that the Act, in so far as it prescribes any criminal procedure, is beyond the powers of the Legislature of the Province of Quebec.

With regard to the second of these questions I have no doubt that it is competent for this court, or indeed for any court in this Province, incidentally to determine whether any Act passed by the Legislature of the Province be an act in excess of its powers. This is a necessary incident of the partition of the legislative power under the B. N. A. Act, without reserving to any special court the jurisdiction to decide as to the constitutionality of any of the Legislatures. The establishment of a general court of Appeal for Canada, under the power given to Parliament by section 101 of the B. N. A. Act, will not relieve the other courts of the duty of deciding as to the constitutionality of Statutes; but, if an appeal

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lies to a general court from every judgment declaring an Act to be unconstitutional, it will have the effect of making the jurisprudence certain and uniform on these important questions. In the meantime it will be most inconvenient if the powers of the Legislature are to be questioned in cases like the present to be decided by one Judge, or on the return of writs of *habeas corpus*, and even by a simple Justice of the Peace. Such decisions will have little or no general authority, so that we may fairly anticipate to see the most conflicting jurisprudence arising in the different Provinces and perhaps in the same Province. But with this inconvenience I have nothing to do, further than to point it out as illustrated by the case before me.

The argument of the appellant is, that by the B. N. A. Act the powers of the Dominion Parliament are enumerated, and also those of the Local Legislatures; that [among] the powers of the former are "the criminal law, except the constitution of Courts of Criminal Jurisdiction, but *including the procedure in criminal matters*;" and that among the powers of the Local Legislatures is the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in sec. 92 of the B. N. A. Act. Appellant at once admits that the Local Legislature had the power to attach a fine, penalty or imprisonment to the sale or keeping of spirituous liquors without a license; but that having done that, a crime was created, and that all the procedure connected with the infliction of punishment for this crime must necessarily be fixed by Parliament, and could not be fixed by the Legislature of the Province. In support of this pretension appellant maintains that every infraction of a public law to which any penalty is attached is a crime.

The question naturally suggests the preliminary investigation as to whether any appeal lies from a conviction under the Quebec License Act. On Tuesday last I intimated my doubts to counsel, and my attention was directed to ss. 150 and 195 of the License Act.

It may be presumed from section 195, that the Provincial Legislature assumed that there was an appeal, but it seems to me to be going too far, to say that the Legislature took it for granted that the appeal was that prescribed by the Act of Parliament, 32 and 33 Vict. c. 31, s. 65. All that section 195 says as regards appeals is, that the delay for giving notice of appeal shall be forty-eight hours. Under c. 99, Con. Stat. C., the delay is three days. This is a step towards assimilating the statute law of the Province to that of the Dominion in this respect; it is, therefore, the reverse of an admission that Parliament has the power to prescribe rules for conducting prosecutions under Provincial legislation. But, whatever may have been the prevailing impression with regard to the matter, we must look to the Dominion Act as our guide.

Whatever may be the definition of a crime, I would remind those who lean too much upon definitions, of their danger; it will not be denied that, in one sense of the word, the act of which appellant is accused is a crime; but it is equally plain that it is not a crime in the sense of sub-sec. 27, sec. 91, of the B. N. A. Act. Now if the signification attached to the word "criminal" is restricted, when referring to law in this sub-section, why should it be used in a different sense when applied to procedure? It cannot be presumed that in one short paragraph, particularly a paragraph of an enumeration of powers, the Legislature should have intended to apply two different meanings to the same word, especially when by doing so they would be transferring the legislation

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with regard to a purely local matter to Parliament. The rule is all the other way. Sub-section 16 of section 92, reserves to the Local Legislature generally, the right to make laws affecting all matters of a merely local or private nature in the Province. What can be more local than the procedure to give force to a local law? If this view be correct, it is not a question of clashing, and the provision of section 91, giving superior authority to the enumeration of the powers of Parliament, does not apply. The powers are perfectly distinct. Parliament makes the laws of procedure affecting the criminal law which it enacts, each of the Legislatures make the laws of procedure affecting the penal laws which they enact respectively. I am, therefore, of opinion that the appeal does not lie under the Dominion Act, 32 and 33 Vict. c. 31, s. 65.

[The learned judge then, after discussing the question whether an appeal was given otherwise, and concluding that it was not, proceeded:]

I am, therefore, under the necessity of declaring that this Court has no jurisdiction in this case, and, therefore, that the appeal must be dismissed, and the record be remitted to the Court below. Having no jurisdiction at all in the matter, I cannot award costs.

Appeal dismissed.

QUEBEC SUPERIOR COURT.

EX PARTE DUNCAN.

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April 29.

[*Reported 16 L. C. Jurist, 188.*]

Criminal Procedure—Civil matters—B. N. A. Act, s. 91, sub-s. 27; s. 92, sub. s. 15—34 Vict. c. 2, Q.

A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.

A Statute of Quebec having provided that no proceedings in civil matters before a District Magistrate should be removed to any other Court by *certiorari* or otherwise, it was held that a proceeding before a District Magistrate for the enforcement of penalties under the License Law of the Province was a civil proceeding within this enactment, and that the right to *certiorari* was taken away.

DUNKIN, J.:—

This is an application for a writ of *certiorari*, to bring up a conviction by the District Magistrate for this District, at the suit of the Revenue Officer, under the Peddler clauses of the Quebec Act, 34 Vict. c. 2, commonly known as the Quebec License Act.

[The learned Judge, after stating the facts and the grounds of the application, the fifth of which was, "Because the Act, 34 Vict. c. 2, of the Province of Quebec, known as the Quebec License Act, under which the present prosecution was brought, is unconstitutional, and was so made and framed by the Quebec Legislature without any authority so to do, and contrary to the provisions of the B. N. A. Act, 1867, which provides that all matters coming within the criminal law, including the procedure in criminal matters, are exclusively confined to the Parliament of Canada," proceeded as follows, p. 189:]

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With the affidavit are produced a certificate shewing that the applicant deposited with the Clerk of the District Magistrate the full amount of the penalty and costs. within the delay required by section 195 of the Quebec License Act; and also copies in full of the declaration and conviction in question. These latter follow faithfully the respective forms D and F, given by the Quebec License Act; the blank for the description of the offence charged being filled in as follows:—

—did "act and carry on business as a hawker, peddler, petty chapman and trading person, by going from town to town and to other men's houses in the District of Bedford, and then and there travelling and carrying to sell, goods, wares and merchandise, and has been found so travelling, trading and carrying on business as such, and among other things has peddled, carried to sell and exposed to sale divers drugs, medicaments and patent medicines in the manner aforesaid, without the license required by the statute in such case made and provided, and without being in any way exempted from the requirements of the said statute."

The case was fully argued on both sides, and with all the earnestness, care and ability which the interest and importance of the questions in issue required.

In rendering judgment upon it, the Court must first deal with the preliminary question raised by the Revenue Officer, as to whether or not the writ of *certiorari* is by law taken away in reference to it.

Section 29 of the District Magistrates Act (32 Vict. c. 23, Quebec), as amended by section 4 of the Quebec Act 33 Vict. c. 11, reads thus:

"No proceedings or suits in civil matters before any such District Magistrate, or before a Magistrate's Court held under this Act, shall be removed to any other Court, by *certiorari* or otherwise, nor shall any appeal lie from

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any order, judgment or conviction, made or rendered by such District Magistrate or Magistrate's Court, except in cases where a right to such appeal exists in virtue of any Act of the Parliament of Canada."

If, within the meaning to be here given to the words "in civil matters," this proceeding before the District Magistrate was a proceeding in a civil matter, the *certiorari* is therefore taken away as to it, by this section. The question is as to that meaning. And it is the more necessary to look carefully into it, because in effect the same question also underlies what may fairly be called the main pretension of the applicant—that, namely, of the so-called "unconstitutionality" of the Quebec License Act, or rather of those of its provisions which go to regulate the procedure for enforcement of its penalties. This procedure, he contends, is in its nature "criminal procedure," and therefore beyond the competency of the Quebec Legislature. If so, the section just cited cannot be held to govern this case; and, indeed, there can be no occasion for other or further enquiry; for, if the assignment of jurisdiction over it by the Quebec Legislature to the District Magistrate, was *ultra vires*, there is at once an end of the case.

The 91st section of the B. N. A. Act, 1867, assigns to the Parliament of Canada the exclusive right of legislation in reference to a very large class of matters, and among others, in reference to "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters;" and the 92nd section of the same Act assigns to the several Provincial Legislatures a like exclusive right of legislation in reference to another large class of matters, among which are enumerated—"shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes,"—"the administration

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of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts," and "the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section" (the 92nd), as exclusively pertaining to Provincial legislation.

It is clear that in these provisions of this statute,—the fundamental law of the land, which only the Imperial Parliament can repeal or alter, to which the Parliament of Canada and the Local Legislature must alike refer for their authority to legislate at all, which they cannot transcend and from which they cannot derogate, and the phraseology of which cannot, therefore, be supposed to be ever out of the mind of our legislators, whether sitting in Parliament or Legislature,—these words "civil" and "criminal" are used in a sense which excludes from the idea conveyed by the latter, and includes within that conveyed by the former, this matter of "punishment by fine, penalty or imprisonment, for enforcing any law" which under this 92nd section a Province alone can legally enact. Jurisdiction is characterized simply as being civil or else criminal. *Crime*—of whatever kind or degree—can be created, its punishment assigned, and procedure relative to it laid down by Parliament alone. No enactment of a Local Legislature can give to any act that quality, or subject it to that punishment, or bring it within the purview of that procedure. But every Local Legislature, without let or hindrance from Parliament—and therefore without need of aid from Parliament—can impose punishment by fine, penalty or imprisonment, for enforcing certain laws which it alone can make. To hold that while it can freely qualify in-

fractions of such laws as punishable, and assign to each its measure of punishment by fine, penalty or imprisonment, the procedure requisite in order to the infliction of such punishment (as being essentially procedure in a criminal matter) must be such only as Parliament may see fit to provide, would be to hold the doubly untenable doctrine that (on the one hand) every Local Legislature can at will create certain crimes and assign certain criminal punishments, and that (on the other hand) Parliament can at will admit such crimes and punishments within, or exclude them from, the range of the procedure needed to repress such crimes by real infliction of such punishments.

Whatever infractions of law, whether as to matters of Dominion or Provincial Legislation, Parliament sees fit to designate as crimes, it—and it alone—can so declare, and as such punish, and to that end regulate procedure. Whatever infractions of any Provincial law coming within the purview of this 92nd section Parliament may not see fit thus to deal with, the interested Province may punish by fine, penalty or imprisonment; but its so doing does not make the offence to be thus punished a crime, nor the procedure laid down in order to its punishment procedure in a criminal matter. On the contrary, such whole matter must remain a civil matter, within what is here the true meaning of these respective terms.

Accordingly, in 1868, Parliament, at its first session, by the Act 31 Vict. c. 71, provided for the protection (so to speak) of the Provinces equally with the Dominion, as against the crimes of forgery and perjury, for making conspiracy to intimidate any Provincial Legislative body, a felony, and for making "any wilful contravention" of any Provincial Act, not otherwise constituted "an offence of some other kind," "a misdemeanor." And these provisions are embodied in the consolidated criminal

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statutes of 1869. At any time, all or any of them might of course be changed at the pleasure of Parliament, so as to throw the enforcement of Provincial statutes in such behalf, more or less, or even wholly, as a non-criminal that is to say, as a civil matter, upon the direct legislative power (as against mere Provincial offences) of the Provinces themselves.

The District Magistrates Act (Quebec, 32 Vict. c. 23) was passed by the Quebec Legislature in 1869, at its second session, with a view to constituting a new description of court, of minor civil and criminal jurisdiction. It purported to vest in the intended District Magistrates all powers theretofore vested in any one or more Magistrates, though many of these powers were admittedly powers of criminal jurisdiction: and also certain other special powers of criminal jurisdiction, several of them theretofore vested in Recorders, Sheriffs and Stipendiary Magistrates; and lastly, under the designation of "Magistrates' Courts," certain other powers of peculiarly civil jurisdiction. So far as all this might affect criminal procedure, or any other matter under the exclusive control of Parliament, it was of course obvious that a mere Act of the Quebec Legislature could not suffice to authorize it. Presumably, it was all inserted in the Act, rather as the best or only way of making known what the Legislature wished done than with any other view. And with the evident purpose of allowing opportunity for such legislation by Parliament as the case required, the last section of the Act provided that it should come into force only from a day to be named by Proclamation. The 29th section of this Act, as thus originally drawn and passed, was in these words:—

"No proceedings or suits before any such District Magistrate, or before a Magistrate's Court held under this Act, shall be removed to any other Court by *Cer-*

tiorari or otherwise, nor shall any appeal lie from any order, judgment or conviction, made or rendered by such District Magistrate or Magistrate's Court."

Some months later in the same year Parliament, at its second session, passed the series of Acts, 32-33 Vict. cc. 18-36 (both inclusive), for assimilating and consolidating the criminal law of the Dominion; and made all needed provision (by Acts 32-33 Vict., c. 32, s. 1; c. 33, s. 1; c. 34, s. 2; c. 35, s. 8; and c. 36, s. 8) for enabling the intended District Magistrates for this Province to deal with such Dominion matters as it was deemed expedient to assign to them. And thereupon at the ensuing session of the Quebec Legislature, held early in 1870, the Quebec Act 33 Vict. c. 11, was passed, amending the District Magistrates Act, in the sense of bringing its provisions within the range of the attributions of Provincial legislation. The sections relative to criminal matters were to this end repealed or amended; section 29 in particular, being amended by inserting after the word "suits," in its first clause, the words "in civil matters," and by adding to its latter clause the words "except in cases where a right to such appeal exists in virtue of any Act of the Parliament of Canada;" and a 32nd section was added to the original Act, so as to place the object in view beyond controversy, in these words:—

"This Act shall be construed as intended to apply to such matters only as are within the exclusive control of the Legislature of this Province, and shall be held to be complemental to any like provisions enacted by the Parliament of Canada, as regards matters within the exclusive control of that Parliament."

It was after having been thus amended, that the Act was brought into operation.

The Court can give no other meaning to these words "in civil matters," as used in amending this 29th section,

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than that indicated by the phraseology of the B. N. A. Act, 1867, with a distinct view to which the amendment was thus manifestly framed. The Legislature meant to remove from their statute all possible seeming of rivalry with Parliament as to matters beyond their own competency, and there is no indication whatever that they meant anything else. To hold that they did mean otherwise and used these words in another sense, and so as not to take away the *certiorari* in cases of summary procedure for enforcing any such punishments as they could legally impose by statute, would be to suppose them to have meant to raise against themselves the strange pretension that such summary procedure was after all procedure in a criminal matter, and therefore—as well the matter itself as the procedure—wholly beyond their power of legislatively dealing with it at all.

That they cannot have meant this becomes (if possible) still more manifest by reference to the coincident legislation of Parliament on that express point which also the Legislature at the time had fully before them. The Dominion Summary Convictions Act (32-33 Vict. c. 31), by its first section, in express terms, limits the operation of its provisions to matters "over which the Parliament of Canada has jurisdiction." And in like manner the Dominion Criminal Statutes Repeal Act (32-33 Vict. c. 32), by its first section, as explicitly limits its repeal of previous laws, and among the rest, its repeal of the Summary Convictions Act of the late Province of Canada, (Consolidated Statutes of Canada, c. 103), in these words:

"Such repeal shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have, under the B. N. A. Act, 1867, exclusive powers of legislation— or to any enactment of any such Legislature for enforcing by fine, penalty or imprisonment, any law in relation to any such subject as last aforesaid, or to any

municipal by-law relating to any offence within the scope of the powers of the municipality."

If, therefore, the Quebec Legislature did here mean to give such a sense to this word "civil" as should render summary procedure on matters within their own exclusive control "criminal," and so subject it exclusively to Dominion control, they must have been meaning to renounce a power of legislation which Parliament had just in plain terms freely recognised as theirs.

It may be objected that there is, however, some confusion of phrase in the 10th section of the District Magistrates Act as it stands amended. In the original Act it reads thus:

"The Act, chapter 102 of the Consolidated Statutes of Canada, respecting the duties of Justices of the Peace out of Sessions, in relation to persons charged with indictable offences, and the Act, chapter 103 of the said Consolidated Statutes of Canada, respecting the duties of Justices of the Peace in relation to summary convictions and orders, shall apply in so far as may be consistent with the provisions of this Act, to all proceedings had before such District Magistrates."

And it was amended by inserting before the words "shall apply" the words "in so far as the said Acts have not been repealed by the Parliament of Canada," and also by adding at the end of the section the words, "and the Acts of the Parliament of Canada 32-33 Vict. cc. 30 and 31 shall likewise apply to all proceedings had before the District Magistrates."

At the time of this amendment cap. 102 of the Consolidated Statutes, relating wholly to criminal matters, and, therefore, wholly beyond the reach of Quebec legislation, in fact stood repealed, with the exception of a single section, the Act 32-33 Vict. c. 30 being substituted in its place; and, therefore, neither the one nor the other

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could apply to any proceeding before a District Magistrate as to which the Quebec Legislature had power to enact anything. And cap. 103 of the Consolidated Statutes, relating partly to Provincial and partly to Dominion matters, stood (as has been already shewn) in full force as to the former, and had been in the main repealed *as to the latter only*, by substitution for it *pro tanto* of the Act 32-33 Vict. c. 31; so that both could not possibly apply to the same proceeding, and the latter could not apply to any proceeding as to which the Quebec Legislature could enact anything. Limited, however, as the whole section is, by the terms of the new section 32, already cited, it claims really to *enact* nothing as to any matter not within the exclusive control of the Province. Chapter 103, in so far as it may be consistent with the provisions of the District Magistrates Act, is made applicable to proceedings under control of the Province; and the other Acts named are recognised as applying in so far (that is to say) as Dominion legislation may direct, to proceedings under control of the Dominion. The question of the meaning to be given to the word "civil" in the 29th section thus stands unaffected by this wording of the 10th.

Another objection may be suggested, from the terms of the 195th section of the Quebec License Act, which provides thus;

"Unless within forty-eight hours after any conviction judgment or order, in any case under this Act, the defendant deposits in the hands of the Clerk of the Justices or Court, the full amount of the penalty or sum and all costs, no such suit, prosecution, conviction, judgment or order, shall be removed by *certiorari* or otherwise, into any of Her Majesty's Courts of Record; nor shall any notice of application for *certiorari* suspend, retard or affect the execution of any such conviction,

judgment or order, nor, unless such deposit has been made, shall any appeal whatever be allowed from any such conviction, judgment or order, to any Court of General or Quarter Sessions."

The applicant (as already stated) has made the deposit in question; but the section does not admit of being read as bearing on the question here in issue. It is an enactment purely and simply restrictive of the right to *certiorari* in regard to License Act cases generally, and has no reference to any question of the liability or non-liability to *certiorari* of any particular tribunal that may be called to deal with any of them; and it can by no means be held to abate in favour of that right, a restriction subsisting under other enactment, in respect of such particular tribunal itself.

The Quebec Legislature, then, having under the 92nd section of the B. N. A. Act, 1867, exclusive control in respect of the licenses dealt with by the Quebec License Act, and of the imposition of punishment by fine, penalty or imprisonment, for enforcing its laws in that behalf, and therefore of the procedure to that end, which procedure again is therefore not criminal but civil, and the Quebec License Act making such civil procedure a matter cognizable by a District Magistrate, the Court must hold that under the 29th section of the District Magistrates Act the right to *certiorari* is taken away in respect of it.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

Application for certiorari rejected.

QUEBEC COURT OF QUEEN'S BENCH—CROWN SIDE.

1873
Oct. 12.

WARREN PAGE ..... *Petitioner.*

v.

JOHN GRIFFITH ..... *Respondent.*

[*Reported 17 L. C. Jurist, 302.*]

Criminal law—Procedure, power to regulate.

A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.

This was a petition in appeal from summary conviction of justices of the peace to this Court as exercising appellate jurisdiction where appeals are given to the Quarter Sessions, there being no Court of Quarter Sessions in the District of St. Francis.

Mr. *W. L. Felton*, Q.C., for petitioner.

Mr. *E. T. Brooks* for respondent.

SANBORN, J.:—

This is a petition in appeal from a conviction made by justices of the peace against the petitioner, adjudging him to pay two penalties of $50 each for two separate violations of the License Act 34 Vict. c. 2, passed by the Provincial Parliament of Quebec, for illicit sale of spirituous liquors.

The respondent, who was complainant before the justices in his quality of Collector of Inland Revenue, submits that no right of appeal exists. Only two questions arise here. Had the Provincial Legislature power to

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provide the procedure for enforcing the penalties incurred under the License Act 34 Vict. c. 2? If it had, has a right of appeal been granted by said Act? As respects the first question, I think the Local Legislature had such power. When the power is given by the B.N.A. Act to the Parliament of the Dominion to provide procedure in criminal matters, I understand reference to be had to the general public criminal law, comprised in the Criminal Statutes of the Dominion and in the common law. This view is confirmed by the Criminal Procedure Act, which has no reference whatever to local penal laws, but to laws in force throughout the Dominion.

The same distinction obtained under the Statutes of old Canada. Under 4 and 5 Vict. c. 25, which is a consolidation of the criminal Acts relating to larceny, a right of appeal was given from summary convictions. Under 4 and 5 Vict. c. 26, which is a consolidation of the Acts relating to malicious injuries to property, a right of appeal is given from summary convictions. Under 4 and 5 Vict. c. 27, which is a consolidation of Acts relating to offences against the person, a right of appeal is given from summary convictions. Each Act made provision for appeal from convictions for offences created by such Act. The Act, chapter 99 of the Consolidated Statutes of Canada gives a right of appeal from summary convictions "under the foregoing Criminal Acts," which include the provisions contained in all these three Acts before cited. When a right of appeal was intended to be given from summary convictions under local penal Acts, such, for instance, as the Tavern License Act and Hawkers and Peddlers' Act, Con. Stat. L. C., chapters 6 and 7, it was provided by the Acts themselves when and in what manner such appeal could be exercised. In this particular I differ from Judge Ramsay, although, in the main, adopting the reasoning used by him in the case of *Pope* v.

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Griffith, cited (1). I do not think there was any dislocation of the subjects of appeal in the consolidation. There never was any general right of appeal given under any of those statutes, only an appeal from convictions, made under the statute, where the right was conferred. This is further evinced by the fact that the right of appeal under Act of Dominion 32 and 33 Vict. c. 31, is secured only for summary convictions for offences over which the Parliament of Canada has exclusive jurisdiction, as will appear on reference to the first section of said Act.

The B.N.A. Act gives the Legislatures of the several Provinces power over shop, saloon and tavern licenses, and to impose fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated among their powers. Where power is given by statute to impose a penalty, it implies power to enforce it (Dwarris on Statutes, p. 23).

The B.N.A. Act must be understood to have given this power to the several Provinces. Any other view would give the Legislature of the Province less power than a municipality, which such Legislature can create. It would be contrary to the manifest intention of the Imperial Parliament in allocating the respective powers which each Legislature should possess.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question].

Petition rejected.

(1) 16 L. C. Jurist, 169; *ante*, p. 291.

QUEBEC SUPERIOR COURT.

1880

COTÉ *v.* CHAUVEAU. *Aug. 12.*

[*Reported 7 Quebec Law Rep. 258.*]

Criminal law—Penalties, power to regulate procedure respecting—41 Vict. c. 3, Q.

A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.

An enactment of the Quebec Legislature prescribing the mode in which penalties for violations of a statute of the Province (41 Vict. c. 3) are to be enforced was held to be valid.

[*Translated.*]

CASAULT, J. :—

[After stating the nature of the complaint which was for selling liquor without a license, and certain objections made to the jurisdiction of the Judge by whom the case was tried, continued, p. 259 of the Report :—]

The complaint is based on the license law of Quebec, of 1878 (41 Vict. c. 3, s. 71), which prohibits those who are not furnished with a license therefor, from selling intoxicating liquors, under a penalty of $75, in case of a violation of the law in an organized territory other than the city of Montreal.

Section 1 of the Act says that "the words 'intoxicating liquors' mean brandy, rum, whiskey, gin, and wines of all descriptions, ale, beer, lager beer, porter, cider, and all other liquors containing an intoxicating principle, and all beverages composed wholly or in part of any such liquors."

The complaint, as appears, contains the special statement of this section, omitting the lager beer, and merely

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repeats as to time and place the same thing, changing only the kind of drink sold.

I do not think this particularity was required, the offence was sufficiently indicated by mention of it in the very terms of the statute without more specially describing the drink sold.

This enumeration of the kinds of drinks alleged to have been sold by *Basile Cote*, is not an enumeration of nine different violations of the law. For that it would have been necessary that there should have been nine distinct sales. The sale at the same time and place, of nine different kinds of drinks only constitutes one sale, and therefore only one offence, unless it be alleged that the sales have been made to different persons.

Supposing even that the complaint embraced several offences, it would not for that reason be bad, section 205 of the same statute allowing several breaches committed by one person to be combined in one complaint. The section is in these words: "Several cases of contravention of this law committed by the same person may be cumulated in one and the same declaration, information, complaint, or summons, provided that such declaration, complaint, information, or summons contains specifically the time and place of each contravention; and in such case, the forms indicated by this law shall be modified *mutatis mutandis*."

The petitioner maintains that the Legislature of Quebec has, in this legislation, exceeded its powers, and that the statute being penal, it had no authority to determine the mode of recovering the penalties which it created, and he cites s. 91 of the B. N. A. Act, 1867, commonly known under the name of the Confederation Act, which reserves to the Federal Parliament the right of legislating on procedure in criminal matters. But a statute may be penal without being a criminal law. The license law is penal

in this sense that it inflicts on those who infringe it, fines, penalties and even imprisonment; but the violations of the rules which it makes are in no way criminal. Criminal matters are those embraced by the criminal laws, whether statute or common law, and it is as to the procedure relative to them that the power of legislation is exclusively reserved to the Parliament of Canada by sub-s. 27 of s. 91 of the said Act. By s. 92, sub-s. 15, of the same Act power is given to the Provincial Legislatures to impose fines, penalties and even imprisonment, for enforcing the laws made by them as to the legislative matters which come within their powers and among which are shop and tavern licenses. The recovery of the fines which the license law imposes is so little a criminal proceeding that it may be prosecuted by action before the civil courts. Besides the right of imposing fines, in the absence of any contrary provisions in the Imperial Act aforesaid, involves that of regulating the recovery of them.

If the provision of the License Act which allows several breaches to be included in the same complaint, was *ultra vires*, that is to say illegal and void, we should remain with the right, such as it existed on this point in the Province of Canada, or such as the Parliament of Canada has made it.

Now the Parliament of Canada having determined nothing in the Act 32-33 Vict. c. 31, as to the duties of Justices of the Peace out of Sessions, with respect to orders and summary convictions, nor in any of the amendments since made to the Act, and the Legislature of the Province of Canada, not having done so either in the Acts relating to orders and summary convictions, which in 1859 were consolidated and form cap. 103 of the Consolidated Statutes of Canada, we should remain with the rule of the common law, and it is this rule which s. 205 of the License Act reproduces.

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The common law allows several penalties to be joined as well in convictions as in actions.

Lord Kenyon in *R.* v. *Swallow* (1), states it thus:—"There is no objection to the conviction on the ground that the defendant has been convicted of several penalties; it is the constant practice in actions on the game laws, and *not* unfrequent in convictions. Even in indictments for capital offences, several offences are sometimes charged."

In this case, the magistrate had convicted the defendant of three different offences, and the conviction was upheld. Paley Convictions, pp. 75 and 257 (ed. 1866), or c. 2, s. 2, and c. 3, s. 3. Also Burns' Justice, p. 1109, No. 5, and the decisions there cited.

The Imperial Act 11 and 12 Vict. c. 43, which has, in certain cases, forbidden several distinct offences to be joined in one and the same conviction, is not law here, and our statutes contain no analogous provision (2).

[The remainder of the judgment is occupied in discussing other objections which do not affect the constitutional question.]

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(1) 8 T. R. 284, 286.

(2) This judgment was affirmed by the Court of Appeal, on Sept. 8, 1881. The judgment in appeal does not appear to have been yet reported.

QUEBEC COURT OF QUEEN'S BENCH.

[IN CHAMBERS.]

EX PARTE WORMS.

1876
Feb. 21.

[*Reported 22 L. C. Jurist, 109.*]

Extradition—Regulation of by Imperial Enactment—B. N. A. Act, s. 132.

The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding the B. N. A. Act, previously passed, gives to the Canadian Parliament jurisdiction to carry out obligations resulting from extradition treaties.

DORION, C. J.:—

[After disposing of certain objections which do not affect the constitutional question, the learned Chief Justice said:—]

It was also urged that the Act of 1870 (Imperial Extradition Act) could not apply to Canada, because by the B. N. A. Act, section 132, the power to carry out any obligation resulting from extradition treaties had been absolutely given to Canada, and that if the Act was in force then the formalities required were not observed, as no warrant from the Governor-General had preceded the issuing of the warrant to arrest the accused. The answer to this objection is very simple. In the first place the Act of 1870 is not inconsistent with section 132 of the B. N. A. Act of 1867, and. if it were, the last Act should prevail. As to the second branch of the objection, it is unfounded, inasmuch as the Act of 1870 merely authorizes the Secretary of State in England and the Governor of a British possession to issue an order

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requiring a police magistrate to issue his warrant for the apprehension of a fugitive criminal, but does not require it in every case; this is made evident by section 8 of that Act. This order is also expressly dispensed with by our Extradition Act of 1869, which must be taken as part of the Act of 1870.

QUEBEC COURT OF QUEEN'S BENCH.

REGINA *v.* HORNER. 1876

[*Reported 2 Stephens' Digest, 450.*]

Magistrates, right of Provincial Executive to appoint—B.N.A. Act, ss. 96, 130.

Under the B. N. A. Act, the right to appoint magistrates, such as District Magistrates in the Province of Quebec, is vested in the Provincial Executives; and this right is not affected by the provisions contained in sections 96 and 130 of that Act.

On a petition for *habeas corpus*, the question of the respective powers of the Local and Dominion Legislatures was brought up. The prisoner was convicted under the Quebec License Act, 34 Vict. c. 2, s. 31, before a District Magistrate appointed under the provisions of the Acts of the Legislature of Quebec respecting District Magistrates and Magistrates' Courts in that Province. It was contended that the Legislature of the Province of Quebec had no authority to legislate on these matters, and that even if it had, the Lieutenant-Governor had no right to appoint a District Magistrate for that he is a District Judge, and that the Governor-General has alone the power to appoint such officers.

By the Court [RAMSAY, J.]: The difficulty in this case arises from the partitioning of the legislative powers of the general and local Legislatures. The criminal law is given to the Parliament of Canada, as also procedure in criminal matters, while the constitution, maintenance and organisation of criminal courts are given to the Local Legislatures. Now, where does the "constitution" of the court end, and where does "procedure"

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begin? The dividing line between these powers is not very distinct. It has already given rise to considerable difficulty. It was questioned whether the Local Legislature could make a law for summoning juries for criminal trials, and it was considered expedient to avoid the difficulty by passing an Act of Parliament. We have no such assistance in deciding this case; but one of the learned counsel for the petitioner has abandoned the pretension, [that the Act was unconstitutional in so far as it creates Magistrates' Courts, contending only that the Local Legislature has exceeded its powers in reserving to the local executive the power to appoint the magistrates who are to hold these courts]. (1) Whatever difficulty there may be as to the conflict of the powers as an abstract question, in face of the case of *Coote* (2) the learned counsel was fully justified in abandoning the first pretension. The case of *Coote*, decided in the Privy Council, directly recognises the powers of the Local Legislatures to create new courts for the execution of the criminal law, as also the power to nominate magistrates to sit in such courts. We have, therefore, the highest authority for holding that generally the appointment of magistrates is within the powers of the local executives.

So much being established, almost all difficulty disappears. The Privy Council recognises the general principle that the executive power is derived from the legislative power, unless there be some restraining enactment. In this case it is said there is such an enactment (sect. 96,

(1) [In the report the passage in brackets is as follows: "That the Act was not unconstitutional in so far as it creates Magistrates' Courts, and that the Local Legislature has only exceeded its powers in reserving to the local executive the power to appoint the magistrates who are to hold these courts." The passage as here printed has been changed in accordance with what appears to be the meaning.]

(2) L. R. 4 P. C. 599; *ante*, vol. 1, p. 57. [See also *Ex parte Dixon* (Stephens' Digest, 55), where it was held that the Quebec statute creating the office of Fire Commissioners was constitutional.]

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B. N. A. Act). That section specially reserves the nomination of the judges of the Superior Courts, the County and District Courts, save the Courts of Probate in Nova Scotia and New Brunswick, to the Government of Canada. It is quite clear that without this section the appointment of all the judges would be in the hands of the Local Governments; and the sole question then is whether a "district magistrate" is a district judge? Some argument was attempted to be drawn from section 130, B. N. A Act; but that is only a transitory clause, providing for the position of those local officers who have federal duties, "until the Parliament of Canada otherwise provides." By that section they are created officers of Canada, and declared to be subject to all the responsibilities and penalties they were subject to before the union. In saying they are federal officers, the statute must be understood, *quoad* their federal duties, for the Parliament of Canada could not legislate as to their local duties. I do not, then, see that section 130 affects the question before the Court; and we are of opinion that a district magistrate is not a district judge within the meaning of section 96 of the B.N.A. Act. We are, therefore, against the petitioner on this point. (1)

(1) [See Reg. *v.* Bennett, 1 Ont. Rep. 445, *post*, where it was held by Cameron, J., that Provincial Legislatures have the right to legislate respecting the appointment of Justices of the Peace. And see also *Ex parte Reno*, 4 Pr. Rep. (Ont.) 281, *ante*, vol. 1, p. 810.]

QUEBEC SUPERIOR COURT.

[A question has been before some of the Quebec Judges as to whether a Provincial Legislature has power, under the B. N. A. Act, to authorize punishment by *both* fine and imprisonment, or by only one of these modes. Mr. Justice Drummond held that the latter was the proper construction of the Statute. The same construction was adopted by Mr. Justice Torrance. Mr. Justice Sanborn, in a subsequent case, took a different view and declined to follow these decisions. The point does not seem to have been the subject of any other reported judgment. The three cases are here printed together in their chronological order.]

1871
Nov. 24.

EX PARTE PAPIN.

[IN CHAMBERS.]

[*Reported 15 L. C. Jurist, 334.*]

In the Recorder's Court for the city of Montreal, the petitioner was convicted of gambling in a tavern in the city, contrary to the by-law in such case made and provided, and was condemned to pay a fine of $20 *and* to be imprisoned for two months, and was, in consequence, committed to the common gaol about the 2nd of November, 1871. A writ of *habeas corpus* was issued, and the case was argued in Chambers. The counsel for the petitioner, amongst other objections to the conviction and commitment, contended that the Legislature of Quebec exceeded its authority in granting to the Corporation of Montreal, by the Act 32 Vict. c. 70, s. 17, powers of punishment for infraction of by-laws more extensive than it possessed itself, with respect to offenders against its own laws. By that local Act the corporation is vested with the right of imposing a cumulative punishment, fine and imprisonment, whereas the Local Legisla-

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ture does not possess that right, under the B. N. A. Act, 1867, s. 92, sub-s. 15.

Mr. *Kerr* for petitioner.

Mr. *Devlin* for Corporation of Montreal.

DRUMMOND, J.:—

The most important point to be considered is the extent to which the Local Legislature can empower the Corporation to punish by fines, imprisonment, or both, parties detected in the infraction of the by-laws. The Local Legislature, under the 32 Vict, c. 70 (1869), cannot endow municipal corporations with powers of punishment for infraction of their by-laws more extensive than it possesses itself. The enactments of the B. N. A. Act, 1867, s. 92, sub-s. 15, are as follows:—"The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Therefore the punishment imposed by Local Legislatures cannot be cumulative; it must be either fine, penalty, or imprisonment; it cannot be fine and imprisonment. This provision. therefore, limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to corporations any greater powers of punishment than they possess themselves, so that the 32 Vict. c, 70, s. 17, is clearly unconstitutional, in so far as it assumes to authorize the imposition of punishment by fine and imprisonment, for infraction of a by-law of the city of Montreal. This s. 17, of the 32 Vict. c. 70, being the clause relied on to maintain the commitment and conviction in this matter, *Papin* having been condemned to pay $20 and to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged.

QUEBEC SUPERIOR COURT.

1872
Sept. 20.

EX PARTE PAPIN.

[*Reported 16 L. C. Jurist, 319.*]

The applicant was convicted on the 6th November, 1871, of the offence of playing cards for money, contrary to the municipal by-laws of Montreal. The by-law was enacted under the authority of the Quebec Act 32 Vict. c. 70, s. 17, which gives power to inflict fine or imprisonment or both. The defendant was condemned to pay $20 and costs, amounting to $1.50, and further to be imprisoned for the space of two months.

Mr. *Kerr*, for the petitioner, contended that the Legislature of Quebec exceeded its powers by the above enactment. Its powers were conferred by the B. N. A. Act, s. 92, sub-s. 15. The conviction, as well as the by-law (Glackmeyer, p. 138, A. D. 1870,) and the Quebec Act, should have been in the alternative. The case has already been decided by Mr. Justice Drummond, in *Ex parte Papin* (1).

Mr. *Devlin* was heard in support of the conviction.

Judgment was given by TORRANCE, J., quashing the conviction, as follows:

The Court, etc.:—

Considering that the Legislature of the Province of Quebec had no power to fine as well as imprison, the B. N. A. Act. 1867, only conferring the power of fine, penalty or imprisonment in the alternative;

(1) 15 L. C. Jurist, 334; *ante*, p. 320.

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Considering, therefore, that the conviction complained of is illegal, inasmuch as the petitioner was thereby condemned to pay a fine of twenty dollars as well as to be imprisoned for two months, doth reject the motion of prosecutors, and doth grant motion of petitioners, and doth therefore quash and set aside the said judgment of the 6th November, 1871, with costs against prosecutors, etc.

QUEBEC SUPERIOR COURT.

1873

WARREN PAIGE ..... *Petitioner;*

v.

JOHN GRIFFITH ..... *Respondent.*

[*Reported 18 L. C. Jurist, 119.**]

Mr. *W. L. Felton*, Q. C., for the petitioner.

Mr. *E. T. Brooks*, for the respondent.

SANBORN, J.:—

The petitioner in this cause raises six objections to the conviction made by three justices of the peace, whereby he is condemned to pay two penalties, $100 and costs $28.46, for selling by retail spirituous liquors in the temperance hotel of William Paige, of Compton, and is ordered to be imprisoned for six months unless the amount awarded is sooner paid:

Firstly,—That the tribunal constituted to adjudicate upon complaints under the License Act, as respects ordinary Magistrates of the District, consists of "two Justices of the Peace for the District," and more or less than two does not meet the requirement.

Secondly,—That there is no offence specified in the complaint to which penalty is attached.

Thirdly,—That the conviction should be complete without reference to the complaint, and should be in the form provided by the Act.

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* [This case is also reported in 10 C. L. J., N. S., 135, *sub nom.* The Queen and Joseph Lougee *et al.*, Justices of the Peace; and Warren Paige, Petitioner, and John Griffith, Collector of Inland Revenue, Respondent.]

Fourthly,—That the conviction containing order of imprisonment upon the option of complainant being declared is bad, as time must be given after conviction for petitioner to pay; and then only, upon failure to pay, could the prosecutor declare his option for imprisonment without distress.

Fifthly,—That petitioner had been illegally convicted of two offences without mention of the time when each was incurred.

Sixthly,—That the evidence is illegally applied to both charges indiscriminately, and sustains neither as to specific time, as alleged in the complaint.

[The learned Judge, after dealing with the first three objections, proceeded as follows, p. 121 :]

The fourth objection is that the option of prosecution for imprisonment, instead of distress, is no part of the conviction, and being included therein vitiates the conviction. The regular mode undoubtedly is, first to convict, then the defendant is expected to pay instanter; if he does not, the prosecutor may choose imprisonment under the Act, instead of distress. There is a reported case in which, under like circumstances, immediate imprisonment was held good, even when defendant was not present at the time of conviction. In that case, however, the conviction appears to have been entered, and the order for imprisonment was a subsequent act. (1)

This adjudication of imprisonment being a substantive part of the conviction, leads me to consider the question decided by Mr. Justice Torrance, as well as by Mr. Justice Drummond in the *Papin Case* (2). It is there held that the B.N.A. Act does not confer power (s. 92, sub-s. 15) upon the Local Legislature to enforce laws made upon

(1) Arnold v. Dimsdale, 75 C. L. R. 579.
(2) 15 L. C. J. 334; 16 L. C. J. 319; *ante*, pp. 320, 322.

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subjects within its jurisdiction by both fine and imprisonment at the same time. I cannot agree with this holding.

The words of the Imperial Act are: "the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." It was held in the case referred to that only one of these modes of punishment could be exercised at one time, because the enactment is in the alternative, as indicated by the word "or." I think it was intended by this section to give the range of these modes of punishment, not one or other of them, and only one at a time. The word "or" is not necessarily disjunctive in all cases. It is sometimes a mere connective. For instance, Art. 325 of the Civil Code provides for interdiction in case of "imbecility, insanity, or madness." Ray, in his Medical Jurisprudence, classifies under the general head of insanity idiotcy, imbecility, mania and dementia, and remarks, "It is not pretended that any classification can be rigidly correct, for such divisions have not been made by nature, and cannot be observed in practice."

The word "or" in this instance cannot certainly be used in a disjunctive sense. Dodderidge, J., in *Creswick* v. *Rooksby* (1), said: "These words, conjunctive and disjunctive, are to be taken *promiscue*; and when the sense is the same they (the words 'and' and 'or') are all one. I take it, at all events, that there is sufficient ambiguity in the expression to warrant a resort to the rules of interpretation where there is want of explicitness in the words of the statute.

The B. N. A. Act, conferring legislative powers, is not

(1) 2 Bulst., 47, 51. Dwarris on Stats., p. 682.

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to be construed rigorously like a penal Act, conferring judicial powers.

Prior to the B.N.A. Act there can be no doubt that each Province had the power to enforce laws which now relate to subjects under the exclusive jurisdiction of the Provincial Legislature by fine, penalty and imprisonment, using discretion as to one or all, as circumstances might require. It is a generally accepted doctrine that where the Imperial Government has granted powers to a colony it never withdraws them. This doctrine is recognised in *Phillips* v. *Eyre* (1).

If the Imperial Act is to be understood in the restrictive sense, and the Provincial Legislature can only enforce their laws by fine, penalty *or* imprisonment, taking its option by one of the three modes, but by only one of the three modes, then a right and power which existed before that Act was passed has been taken away, inasmuch as the Provincial Legislature has exclusive jurisdiction over certain classes of subjects, and if it has not the large powers that existed under the old constitutional Acts, it has been taken away altogether; and the inference necessarily follows that it was intended, contrary to constitutional maxims of legislation, to abridge our powers, and it has been done. This conclusion should not be reached unless we are forced to it by explicit enactment or by evident intendment gathered from the Act generally.

Chancellor Kent says: "It is an established rule in the exposition of statutes that the intention of the law-giver is to be deduced from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of

(1) L. R. 6 Q. B. 1.

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terms." Again he says: "For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: What was the common law before the Act? What was the mischief against which the common law did not provide? What remedy the Parliament had provided to cover the defect? and the true reason of the remedy?"

Applying these rules in their spirit, we must consider what legislative powers existed in the several Provinces of the Dominion prior to the passing of the B. N. A. Act; and was it the intention to abridge these powers, or simply to make a new distribution of them? I think plainly the latter. The words "by fine, penalty or imprisonment" were not so well chosen as more definite language to express the intention of the legislators, but I cannot think it was intended to give power to the Provincial Legislature to exercise only one of these modes of punishment at a time in any particular Act. It must have been intended to apply each according to the circumstances and gravity of the offence, and to use both or all where required. If the expression "fine, penalty or imprisonment" is to be understood distributively as between penalty and imprisonment, it must be so understood as between fine and penalty, which would create a distinction too subtle for practical application. In fact, the words fine and penalty, are so alike that the one runs into the other. Dwarris says: "In construing Acts of Parliament, judges are to look at the language of the whole Act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act, they can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is their duty to give effect to the larger expressions."

For these reasons I am of opinion that the Provincial Legislature has not exceeded its powers in enforcing the License Act, or any other law relating to the class of subjects within its jurisdiction, by all the modes mentioned, used separately or together according to circumstances.

[The remainder of the judgment, which relates exclusively to the fifth and sixth objections, is omitted.]

QUEBEC SUPERIOR COURT.

1872
March, 30.

EX PARTE JAMES SMITH *et al.* AND HEMPSTEAD, *mis en cause.*

[*Reported 16 L. C. Jurist, 140*]

Dominion Parliament, authority of—Commission rogatoire—31 Vict. c. 76, D.

Per Torrance, J.: The Dominion Parliament can confer authority upon Courts and Judges in Canada to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matter pending before any British or foreign tribunal; and the Dominion Act 31 Vict. c. 76, which contains provisions for this purpose, was therefore held to be valid.

TORRANCE, J.:—

This case comes before the Court on a novel application, under the Act of the Dominion Legislature, 31 Vict. c. 76 (1), by which this Court is authorized to order the

(1) 31 Vict. c. 76, s. 1: "Where upon an application for that purpose it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction, in any other of Her Majesty's Dominions, or in any foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony, in relation to such matter, of any party or witness within the jurisdiction of such first mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge, in their or his discretion, to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such party or witness accordingly, and by the same or any subsequent order to command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents to be mentioned in such order, and of any other writings or documents relating to the matter in question, that may be in the possession or power of such party or witness."

Sec. 6: "The Court of Appeal for Canada, in the event of such Court being constituted, and the Superior Courts of Common Law or Equity in any Province in Canada, and any Judge of such Courts shall respec-

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attendance of a witness to be examined under a commission *rogatoire* issued out of a foreign court. The witness whom it is desired to examine makes default, and objects that the order was granted without any sufficient or legal evidence being adduced; and he also contends that this Act of the Dominion Parliament is unconstitutional, inasmuch as it has reference to a matter of procedure, which is within the jurisdiction of the Quebec Legislature. This, however, is a matter of international comity, and the Act is one which the Dominion Parliament might very properly pass. Matters of international comity are more under its control than under the control of the Legislature of Quebec. The attachment (*contrainte*) asked for against the witness must therefore be granted without any hesitation.

Kerr, Lambe and *Carter* for petitioners.

Abbott, Tait and *Wotherspoon* for *mis en cause.*

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tively be Courts and Judges having authority under this Act; and the said Courts may respectively frame rules and orders in relation to procedure to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Act, and generally for carrying this Act into effect; and in the absence of any order in relation to such evidence, letters rogatory from any Court of Justice in any other of the Dominions of Her Majesty, or from any foreign tribunal, in which such civil or commercial matter may be pending, shall be deemed and taken to be sufficient evidence in support of such application."

QUEBEC SUPERIOR COURT.

1873
March 31.

WILLETT *v.* DEGROSBOIS.

[*Reported 17 L. C. Jurist, 293.*]

Election Laws in force in late Province of Canada—B. N. A. Act, ss. 41, 129.

An Act of Canada passed before 1867 made void any contract referring to or arising out of a Parliamentary election, even for payment of lawful expenses; the Dominion Parliament passed an Act respecting Dominion elections, but not containing this or any like provision: *Held*, that this provision, not having been repealed, was in force in Quebec as respects Dominion elections under ss. 41 and 129 of the B. N. A. Act, and that therefore a promissory note given for the expenses of a subsequent Dominion election was void.

MACKAY, J.:—

[After stating the facts and commenting on the pleadings, the learned Judge proceeded as follows, p. 294:]

Another point is forced upon us and is to be disposed of. It has been contended at the final argument, beyond what has been pleaded, that a note like the one sued upon is void for illegality, whether the cause of it was legal expenses or illegal, of or about an election; and the 23 Vict. c. 17 of 1860 (of the late Province of Canada) is relied upon by defendant. It is entitled "An Act for the more effectual prevention of corrupt practices at elections." Its section three makes it illegal to hire carters or to promise to pay carters to bring or convey voters to or from the poll at any election. Section six makes "void in law every executory contract, or promise, in any way referring to, or arising out of, *any Parlia-*

mentary election, even for the payment of lawful expenses." The B. N. A. Act keeps this to be law in the territory of the late Province of Canada, says the defendant.

The plaintiff contends that this law of 1860 was only made to have force in or about elections for the Union of Canada, that is, Quebec and Ontario ; that that Union being dissolved the law cannot work now, and nothing in it can affect anything connected with a Dominion election. Besides (says plaintiff) the Dominion Parliament has legislated upon the subject by the 34 Vict. c. 20.

The defendant relies upon section 129 of the B. N. A. Act: "Except as otherwise provided by this Act, *all laws* in force in Canada at the Union shall continue as if the Union had not been made." The B. N. A. Act orders, in section 41, a continuance of the then existing election laws in the several Provinces relative to the following matters, viz., qualifications of candidates and of voters, the proceedings at elections, etc., until the Parliament of Canada otherwise provides.

Has section 129 left still to have force the 23 Vict. c. 17 ? I think it has ; and we must hold that, though doing so it be that we have this much law in Quebec and Ontario more than they have in Manitoba or Nova Scotia. The 34 Vict. is a law made for the Dominion, but even after it there was left in Quebec and Ontario the 23 Vict. c. 17, s. 6. There is no incompatibility. The sect. 6 referred to is a law on the subject of certain executory contracts or promises, declaring them void in law. It is in force, and is fatal to plaintiff, seeing what has been proved. The fact of the Dominion Legislature having enacted the 34 Vict. c. 20, cannot help the plaintiff. This was enacted for the whole Dominion, but in Quebec and Ontario there was left the 23 Vict. c. 17, s. 6, in full force. Nothing is in the 34 Vict. c. 20, resembling what is enacted by sec. 6

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of c. 17 of 23 Vict., against the executory contracts and promises referred to in it. I believe that the substance of this sect. 6 (supposing it never to have been enacted before) could be at any time made law in any Province by the Local Legislature, and it would not be *ultra vires* of such Legislature under the B. N. A. Act. So the action is dismissed, and plaintiff can get no sympathy, for he was bound to know that going into expenditures as he did for defendant he could not claim upon them in a court of law, but would only have to rely upon the honour of his adverse party.

Under the circumstances, however, I shall not allow costs against the plaintiff. The action is, therefore, simply dismissed, and without costs.

Action dismissed.

Bethune & Bethune for plaintiff.

Cassidy & Lacoste for defendant.

QUEBEC SUPERIOR COURT.

[IN CHAMBERS.]

*ANGERS, Attorney-General, *v.* THE CITY OF MONTREAL. 1876 July 28

[*Reported 24 L. C. Jurist, 259.*]

Trade and Commerce—License Tax on Butchers, Power of Provincial Legislature to authorize.

An Act which authorized the Corporation of the City of Montreal to impose a license tax on butchers keeping stalls or shops in the city for the sale of meat, fish, etc., elsewhere than on the public markets, was held not to be *ultra vires* of the Provincial Legislature, as an interference with trade and commerce.

Mr. *W. H. Kerr*, Q.C., for the petitioner.

Mr. *R. Roy*, Q.C., for the City of Montreal.

JOHNSON, J.:—

This is a petition in the name of the Attorney-General of the Province, under the 997th Article of the Code of Procedure, which reproduced the statutes previously in force respecting proceedings against corporations violating or exceeding their powers, and against persons usurping public offices; and the object is to set aside as illegal a by-law of this city, being No. 90, concerning private butchers' stalls.

I may say at the outset that I had some doubts whether the principal point raised here could come up properly in this manner. The 12 Vict. c. 41 reproduced in the Code, was passed before our present

*[This and the following case, as they relate to the same subject, are here printed together.]

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political system was in existence, and it related to the redress to be had against corporations or individuals, for misconduct in respect to excess of power in the former, and intrusion into office by the latter. The excess of power complained of here seems to be, not that the Corporation exceeded the powers professedly given therein, but that they have exercised powers wrongly given: in other words, that the Local Legislature had no right to give the powers that have been used; and this proceeding is therefore an attack on the statute, and not on the by-law; and most assuredly the 12th Vict. had no such object, nor does the Code go any further than the statute, nor did it come into force after Confederation. But, though I have no doubt that such a thing was never contemplated by the statute or by the Code, yet I am clear also that the words both of the statute and of the Code embrace the present case, for the remedy is given *inter alia*, "whenever any corporation exercises any power, franchise or privilege that does not belong to it;" and the effect of these words, whether contemplated or not, is to subject the by-law to examination with reference to everything that affects the power of the Corporation to pass it.

Therefore I come at once to consider the principal ground of this application, which is that the B. N. A. Act of 1867 confers the exclusive power to regulate trade and commerce upon the Federal Parliament, and that this by-law, being professedly passed under the authority of Provincial legislation, is a violation and an excess of power. It is very true that section 91 of the Imperial Act of 1867 does define the powers of the Federal Parliament, and in these words: "It shall be lawful, etc., to make laws for the peace, order and good government of Canada, in relation to all matters *not coming* within the classes of subjects by this Act assigned

exclusively to the Legislatures of the Provinces;" therefore, before this subject can be said to be within the jurisdiction of the Federal Parliament it must be shewn: First, that power to make laws for Canada (that is for the Dominion) is power to make laws for the local purposes of the Provinces; and, secondly, that it is a power not assigned exclusively to the Legislatures of the Provinces. Neither of these propositions is true. The trade and commerce of the Dominion is a very distinct thing from the individual trades or callings of persons subject to the municipal government of cities; and the exclusive powers of the Provincial Legislatures are specially extended by section 92, to make laws in relation to "municipal institutions," and also in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes." Therefore the corporation, by this by-law, have neither interfered with the trade of the Dominion, nor exercised power which it was not within the exclusive right of the Provincial Legislature to give them.

The by-law is based upon section 123 of the City Charter (37 Vict. c. 51) paragraphs 2, 27, 31, and 32. The 2nd paragraph of this section gives the general power to make by-laws for the health, internal economy, and local government of the city. Paragraph 27 gives power to make by-laws "to establish and regulate public markets, and private butchers' or hucksters' stalls; and to regulate, license or restrain the sale of fresh meats, vegetables, fish, or other articles usually sold on markets." Paragraph 31 authorizes by-laws for the purpose of regulating where and how live stock and provisions may be exposed for sale on the public markets, and specially provides that "the said Council may, if they deem it advantageous, by a by-law to be passed for that purpose, empower any person to sell, offer, or expose for

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sale, in any place beyond the limits of the said markets, meats, vegetables and provisions usually bought and sold on public markets, upon such person obtaining a license for that purpose from the said Council, for which he shall pay to the City Treasurer such sum as may be fixed by such by-law, and by conforming with the rules and regulations contained in the said by-law."

Section 81 of the Charter, using the power given by the 92nd section of the B. N. A. Act, 1867, makes no distinction between the form of a tax, and that of a license it says: "the said Council may also, if they see fit, impose the said tax in the form of a license, payable annually at such times, and under such conditions and restrictions as the said Council may determine."

The power, then, appears to have been constitutionally given by the Provincial Parliament, and properly used by the corporation.

As to the argument that this was virtually a prohibition of trade, it need only be observed that it is merely a prohibition of unlicensed trade, the power to license being clearly given. The amount appears by the evidence to be much less than one-half of what was formerly imposed; nor could I properly consider the amount where there is no specific limit in the law. Dillon, on Municipal Corporations, says, "where there is a clear intent that licenses are imposed as a source of revenue to the city, the Court will not mind the amount."

[The remainder of the judgment is omitted, the same not having reference to the constitutional question.]

The judgment is as follows:—

"Having seen and examined the petition *requête libellée*, presented and filed by the petitioner on the 10th of June last, praying, for the causes and reasons therein stated, that the by-law No. 90, concerning private butchers' stalls, made and passed by the Council, of the

said defendant, on the 22nd day of December, 1875, be declared to be *ultra vires* of the City of Montreal and its Council, and be declared null and void and of no effect, and be quashed and set aside, and having seen and examined the answer of the defendant to the said petition, and heard the parties, etc.;

"Considering that the by-law No. 90 aforesaid is not *ultra vires* of the said Council; but on the contrary is within the powers conferred on the defendant by the statute 37 Vict. c. 51;

"Considering also that the said last mentioned statute is a statute of the Parliament of this Province passed and made in virtue of the powers expressly given to the said Parliament by the B. N. A. Act, 1867, and more particularly by the sections 91 and 92 of the said B. N. A. Act, 1867;

"Considering that the allegations of the said petition are not made out or established either in law or in fact, I, the undersigned judge, do dismiss the said petition with costs."

Petition rejected.

QUEBEC SUPERIOR COURT.

1879
Nov. 7.

MALLETTE ET AL. *v.* THE CITY OF MONTREAL.

[*Reported 24 L. C. Jurist, 263.*]

Trade and Commerce—License tax on butchers, power of Provincial Legislature to authorize.

An Act which authorized the Corporation of the City of Montreal to impose a license tax on butchers keeping stalls or shops in the city for the sale of meat, fish, etc., elsewhere than on the public markets, was held not to be *ultra vires* of the Provincial Legislature as an interference with trade and commerce.

MACKAY, J. :—

This case was argued before me as an injunction case, but has been put before me not on an injunction, except very incidentally, but on the merits of an action by a number of individual butchers joining together as plaintiffs irregularly to sue the City to have a by-law of the 22nd December, 1875, of the city, in so far as imposing on the plaintiffs a license tax of $200 each, declared null, and the City forbidden from collecting the tax. All the plaintiffs are butchers, selling away from public market. Misjoinder is not pleaded by the City, so I will not say anything on that subject. The defendants plead a general denial, and no more. I see no answer to the injunction. The questions to be decided by the Court are therefore not difficult. Have the plaintiffs proved their allegations, and are their law propositions stated in their declaration sound? Are the by-laws (for there really are two) complained of null upon the principles enunciated by the plaintiffs? They say that the city has imposed upon them a business tax and a license tax,

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and that these ought to be declared null as violating the principle of equality, and also the rule that no persons or things can be taxed twice for the same object. The declaration sets forth certain provisions of the City Charter, 37 Vict. c. 51, s. 123, upon which the by-laws attacked are founded, and claims that by common law no Legislature or corporation has right to establish inequality of taxation, whether by name of tax, license, or duty between persons of the same class or occupation. The plaintiffs complain of the by-law prohibiting persons selling meat, fish, etc., at other places than on the public markets, if within 500 yards of a market, unless the persons so selling have a license. This is the one of December, 1875. At the argument it was urged that the by-law is an excess of power, being a regulation of trade and commerce, trade and commerce being, by the B. N. A Act of 1867, exclusively to be regulated by the Dominion Parliament.

The by-law reposes on an Act of the Quebec Parliament passed since Confederation, and this Act, it is claimed, was and is *ultra vires* of the Quebec Legislature, in so far as pretending to confer right on the city to regulate trade and commerce. The by-law referred to has several times been attacked, particularly in the case of *Angers, Atty.-Gen.* v. *The City* (1), judged in 1876 by Mr. Justice Johnson, when the Attorney-General's petition was dismissed, the by-law being declared not *ultra vires* of the city, and the Act 37 Vict. being also declared not *ultra vires* of the Quebec Legislature. "The trade and commerce of the Dominion," said Mr. Justice Johnson in that case, "is a very distinct thing from the individual trades or callings of persons subject to municipal government in cities;" and he went on to observe that the Provincial Legislatures had right to make laws in rela-

(1) 1 24 L. C. J. 259; *ante*, p. 335.

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tion to municipal institutions, and also in relation to shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes, and he found the licenses required by butchers to be imposed, to raise revenue for the city, not unlawfully. In September, 1879, Mr. Justice Jetté, in a case in which one *Levesque*, a butcher, complained of having been convicted under the by-law in question, held the conviction right,and the by-law lawful (1). I look upon the by-law, as partly a regulation of police, and partly a by-law to make revenue, for city purposes, by the way or in form of licenses. I consider it formal and well founded. I see no reason for declaring it null. I can see no reason for allowing butchers to establish stalls wherever they like in the city without regulation. A butcher's shop may very easily be made a nuisance to adjoining, or even neighbouring habitations. The tendency of butchers' shops is by many considered to be to hurt adjoining habitations. M. N. has his patrimonial residence on Dorchester Street west. A butcher sets up a stall next door. May not M. N. feel hurt? May he not consider his enjoyment of his residence diminished? But suppose two butchers set up, one on each side of M. N.!

I consider the by-law complained of reasonable, nor do I see it work inequality of taxation in a bad sense. As to favours to some butchers over others, I see that all can enjoy equally the advantages of the public markets.

Action dismissed with costs.

Doutre, Branchaud & McCord, for plaintiffs.

R. Roy, Q.C., for defendants.

(1) 23 L. C. Jurist, 284.

QUEBEC SUPERIOR COURT.

1877
Feb. 17.

COTÉ *v.* WATSON.

[*Reported 3 Quebec Law Rep. 157.*]

Bankruptcy and Insolvency—Trade and Commerce—32-33 Vict. c. 16, D.—34 Vict. c. 2, Q.

An official assignee or his agent acting under an Insolvent Act of the Parliament of Canada can sell by auction the goods of a bankrupt without taking out a license therefor; and this right cannot be restricted by a Provincial enactment.

The Quebec License Act, 1870, in so far as it seeks to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32-33 Vict. c. 16, and to restrain the powers of assignees in putting that Act in operation, is invalid.

[*Translated.*]

PLAMONDON, J.:—

Onezime Tessier, merchant, of Warwick, having become insolvent in the course of the summer of 1875, *Louis Joseph Lajoie*, Esquire, of the city of Montreal, official assignee, was appointed assignee in the said bankruptcy.

As assignee he sold, by public auction, the stock-in-trade of the bankrupt, and, for this purpose, appointed as his agent, the defendant *Watson*, who made the said sale at Warwick, assisted by the other defendant, *Hamel*, as crier, all being done under the official authority of the said *Lajoie*.

The two defendants were then the authorized agents of the said assignee, selling according to law and in the exercise of his office.

These facts are either proved or admitted.

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The plaintiff, who is the collector of Inland Revenue for the district of Arthabaska, demands from each of the defendants the penalty of not less than $200 and not more than $400 imposed by the License Act of Quebec (1870), namely from the said *Watson* for having caused such a sale to be made at public auction by the said *Hamel*, who was not a licensed auctioneer, and from the said *Hamel* for having himself conducted the said sale without being a licensed auctioneer.

The question which results from the conflict between the parties is of the highest importance.

Had the Legislature of the Province of Quebec the right to pass the Quebec License Act (1870) so far as concerns the Insolvency Act (Act of 1869)?

The B. N. A. Act defines the exclusive legislative powers which are granted to the Parliament of the Dominion of Canada, and also those with which Local Legislatures are clothed, for the purposes of legislation.

To the Parliament of the Dominion of Canada has been given the exclusive power to legislate with respect to the regulation of trade and commerce (30 and 31 Vict. c. 3, s. 91, sub-s. 2, Imperial Act). The terms regulation of trade and commerce imply of necessity full authority over the matter to be so regulated, and ought in the same way of necessity to be interpreted as implying the exclusion of all interference by any other authority in and over the matter so regulated.

The power thus conferred on the Parliament of the Dominion of Canada is a general exclusive power, without limit or restriction in respect of matters of trade and commerce.

Now it is in virtue of this power that the Insolvency Act of 1869 was passed. That Act has essentially for its object the regulation of a commercial matter. The insolvency law has as its aim the administration of the

property of persons who have become insolvent and bankrupt, according to the rules and definitions prescribed by law, and determines the conditions under which that law ought to be put in operation as well as the effects of that operation. If, in order to create a source of revenue the Provincial Legislature has interfered directly or indirectly so as to restrict the operation of the Insolvent Act in the results which necessarily flow from that operation, it has usurped a jurisdiction outside of the special powers conferred upon it by the B. N. A. Act.

Now, in imposing a tax on the sum realized from the sale of an insolvent's effects made by virtue of the Act of 1869, and in restraining the powers of assignees in putting in operation that law, the Legislature of the Province of Quebec has, in the opinion of this Court, acted *ultra vires*.

The Court, therefore, declares that the action of the plaintiff is groundless, and it is dismissed; but the plaintiff having brought his actions for and in the name of our Sovereign Lady the Queen, costs cannot be given against him.

The Court thinks it proper to state that but for the express clause in the statute, it would have given costs against the plaintiff.

QUEBEC SUPERIOR COURT.

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Dec. 29.

EVANS ET AL. *v.* HUDON.

[*Reported 22 L. C. Jurist, 268.*]

Dominion officer, seizure of salary of—38 Vict. c. 12, s. 5, Q.

A Provincial Legislature has no power to declare liable to seizure the salaries of employees of the Federal Government.

The plaintiffs, by attachment after judgment, required Mr. *Dunbar Browne*, collector of Inland Revenue, in Montreal, to declare in the usual form what money, etc., he owed to the defendant *Hudon*.

Mr. *Browne* made the following declaration: "That he has not now, and is not aware that he will have hereafter in his hands, possession or custody, any goods, credits, moneys or effects belonging to said defendant, in any manner whatsoever. The defendant, *Alphonse Hudon*, is an officer of the Inland Revenue, and receives his salary from the bank, on deposit of the pay-list, signed by the different officers, and supported by official departmental cheque signed by me."

Messrs. *Abbott, Tait, Wotherspoon*, and *Abbott*, on the 3rd of December, 1877, on behalf of the plaintiffs, made the following motion:—

"Motion on behalf of the said plaintiffs that inasmuch as it appears by the declaration of the said garnishee, *Dunbar Browne*, in this behalf made, that the defendant, *Alphonse Hudon*, is a public servant and employee in the Province of Quebec, and entitled to salary as such, and the said *Dunbar Browne* is the collector of Inland Revenue at the said city of Montreal, and the head there

of the said department or office of Inland Revenue, in which the said *Alphonse Hudon* is so employed as a public servant; but inasmuch as the said garnishee has failed to conform to the provisions of law in that behalf, and has not, as by law and the statute in that behalf required, made a report to this Court in this cause, under his signature, establishing the amount of the salary due at the time of the service of the writ of attachment in this cause, and the amount of the salary to become due in each month to the said *Alphonse Hudon*, if he should continue in said employment;

"That he, the said *Dunbar Browne*, as such collector of Inland Revenue at Montreal, be ordered, within such delay as to this Honourable Court shall seem right, to make such report to this Court under his signature, establishing the amount of the salary which was due to the said *Alphonse Hudon* as an officer of the public department of Inland Revenue at Montreal aforesaid, in which he was an employee at the time of the service of the writ of attachment in this cause, and the amount of salary to become due to him each month, if he should continue in said employment under the same conditions, the whole with costs."

The judgment [of the Court, RAINVILLE, J.,] is as follows:—"The Court, etc., considering that, according to law, the garnishee aforesaid is neither the head nor deputy head of the public department in which he is employed;

"Considering that, according to law, the head of the department, in which the said garnishee is employed is the Minister of Inland Revenue, and the deputy head of the said department the deputy of the said Minister;

"Considering that the exemption of the salaries of public officers from seizure is a matter of public order,

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and that the Parliament of the Province of Quebec has not the power to declare the salaries of employees of the Federal Government liable to seizure, and that the said garnishee *Browne* is therefore not bound to make the return required by the fifth section of the Act 38 Vict. c. 12:

"Refuses the motion of the applicants, with costs, etc." (1)

(1) [See Leprohon *v.* City of Ottawa, 2 App. Rep. 592: *ante*, vol. 1, p. 592, where it was held by the Court of Appeal for Ontario that a Provincial Legislature cannot impose a tax upon the official income of an officer of the Dominion Government.]

QUEBEC SUPERIOR COURT.

EX PARTE LEVEILLÉ. 1877

[*Reported 2 Stephens' Digest, 445.*]

License Law, power to impose penalty for violation of—Trade and Commerce.

The B. N. A. Act in conferring legislative jurisdiction over particular subjects, must be held to have given at the same time the powers needed for the effective exercise of the jurisdiction granted; consequently, the right conferred on Provincial Legislatures to make laws in relation to shop, saloon, tavern, auctioneer and other licenses, includes the right of imposing penalties for violating the Provincial laws in relation to those subjects.

Provincial enactments by which persons who sell liquor by wholesale are required to take out a license are not invalid as an interference with trade and commerce.

Petitioner applied for a writ of *certiorari* from a conviction of the police magistrate, for having sold a dozen bottles of beer at one time, without having previously obtained a license to do so in terms of the Quebec License Act, on the ground *inter alia* that the conviction was null and void, and beyond the jurisdiction of the police magistrate, because the Quebec Acts, upon which alone the conviction rests, were *ultra vires* of the Quebec Provincial Legislature and unconstitutional so far as affecting wholesale dealers, and again because the said Acts are in regulation of trade and therefore *ultra vires*. The prosecutor relied upon sub-sec. 9 of sec. 92 of the B. N. A. Act.

MACKAY, J.:—

I hold that the B. N. A. Act must be interpreted as any other statute. The whole of it must be considered, and if possible force must be given to each clause of it.

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Though the 91st section reads as it does, the next one has been enacted. Why? Surely not to conflict with the preceding one; but, presumably, to work with it. I think it a qualification of it; as the last statute in point of time controls, so later clauses are held to qualify earlier ones; the last clause is the last expression of the law maker. Cannot section 92 be worked without violence against 91? I think that it can. Ninety-one being enacted, 92 expresses a particular intention in the nature of an exception to it. It is said to be repugnant; no more so than would have been a proviso to the same effect. Ninety-one gives the Dominion the regulation of commerce in the wide sense, but 92 allows Quebec Province to make certain regulations affecting purely internal commerce.

The Quebec Legislature does not, as I understand, pretend to regulate the trade and commerce of the Dominion; it may concede to the Dominion exclusively the right to "regulate trade and commerce" in the wide sense, and yet claim to have a right towards raising revenue for provincial purposes, to lay taxes on shops, saloons, taverns, auctioneers and others. The Dominion Parliament has no power to do *that*; but, clearly I think, power to do it has been conceded to Quebec Province by section 92; and all that is necessary to enable the power to be exercised with effect must be held to have been conceded. Quebec Province would in vain tax shops and taverns unless sales otherwise than under licenses (such a sale for instance as *Leveille* has made of a dozen bottles of beer) could be ordered by it to expose to penalties. Who would pay for a shop or tavern license if he could sell beer without one, and expose himself to no penalty?

"Power to regulate commerce is not at all like that to lay taxes. The latter may well be concurrent, while

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the former is exclusive, resulting from the different nature of the two powers. The power of Congress, in laying taxes, is not necessarily or naturally inconsistent with that of the States. Each may lay a tax on the same property, without interfering with the action of the other" (1). It was meant to be so here, in a degree, I think. If the Quebec License Act be so unconstitutional as petitioner claims, it is strange that the Governor-General has not disallowed it. When the Quebec Legislature, using the powers given to it by [sect.] 92, exceeds, I make no doubt the Dominion Government will interfere.

It is not for me, in disposing of the present case, to define the exact boundaries of the power of the Quebec Legislature taxing under [sect.] 92. The power to tax by means of a system of licensing exists, that is certain. Within what boundaries can I say that this power is abridged, where and when does the power to tax end? It has limits; at any rate it ought to have; but what are they exactly?

The Quebec Legislature has gone, in words, to the extent of prohibiting sale wholesale of spirits and beer, except by shop or tavern licensed persons, without distinction of liquors imported in bulk, sold in bulk as imported, and other liquors, *e.g.*, manufactured in Quebec Province and sold here. Section 92 does not read to prevent them insisting on licenses being taken to sell liquors wholesale. Mr. Justice Strong would hold a license which would amount to prohibition to be an undue interference with the exclusive powers of the Dominion Parliament, and I could agree to hold the same thing. I do not see that the petitioner can complain with reason that the Quebec Legislature has exceeded and abused its powers as regards him in the present case.

Certiorari quashed.

(1) Story on the Constitution, s. 1068.

QUEBEC SUPERIOR COURT.

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ROSS ET AL. *v.* TORRANCE ES QUAL., THE CITY OF MONTREAL, claimant, and plaintiffs, contesting.

[*Reported 2 Legal News, 186.*]

Interest, right to legislate on subject of—B. N. A. Act, s. 91, sub-s. 19.

The general law having limited the rate of interest in the absence of agreement between the parties, to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. "increase" on overdue assessments, the so-called increase being but another name for interest. (1)

A municipal corporation was authorized by an Act, in force at the time of Confederation to charge ten per cent. on overdue assessments; the Legislature of Quebec passed an Act repealing this enactment and providing anew for a similar charge; *Held*, by Johnson, J., that the former enactment was effectually repealed, and that the new enactment as to increase was invalid. (2)

JOHNSON, J.:—

Under the Prothonotary's report of partial distribution, as drawn in this case, there is a sum of $995.08 given to the city for arrears of assessments on the property sold by the Sheriff; and the plaintiffs, who brought it to sale for the satisfaction of their hypothecary claim, contest this item in part; that is to say, as far as regards three sums of $79.43, $178.71, and $18.09, making together the sum of $276.23 asked by the city as a ten per cent. increase on overdue assessments, and these three charges for increase, as it is called, in the claim, or rather in the account which the corporation are by law

(1) [See next case.]

(2) [But see Corporation of Three Rivers *v.* Sulte, *ante*, at p. 286; Keefe *v.* McLennan, *post*; and other cases].

allowed to substitute for a regular demand or opposition (see art. 719 C. P.), are resisted on three separate grounds. First, the plaintiffs say that these charges, though made under the name of increase, are in reality charges for interest at ten per cent. for delay in paying overdue taxes; and that, as such, they are not authorized and cannot be authorized by Provincial legislation subsequent to the B. N. A. Act, 1867, which vested the power of legislating on this subject in the Federal Parliament. Secondly, they say that these charges are continued to be made up to February, 1879, while the property was sold in December, 1878; and, thirdly, they say the proprietor assessed was not in default, the assessments having been reduced by the corporation, and no default existing where the assessment is acknowledged to be wrong.

There are two by-laws of the corporation professing to authorize these charges: 1st, one of April, 1876, and 2nd, one of August, 1878; and the questions will be, first: is there anything having the force of law to empower the corporation to make them; and 2nd, whether there is any difference in law between *interest, eo nomine* and *increase, addition* or *penalty* imposed for delay of payment.

The 75th section of the 14 and 15 Vict. c. 128—passed before Confederation—clearly gave the right to impose an increase or penalty, and there it might have remained to this day, unless it had been repealed; but the 37 Vict. c. 51, instead of leaving well alone, repealed sixteen different statutes respecting the corporation of Montreal, and consolidated the law generally; and on this particular subject it gave power to the corporation to remit by way of discount for prompt payment, or to charge "interest" (*eo nomine*) at ten per cent.; and under this statute the first by-law was passed.

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Among the statutes repealed by the 37 Vict. c. 51 (sec. 241) was the 14 and 15 Vict. c. 128, which by its 75th section had given the power; and this statute, I say, was absolutely repealed, with the exception of six sections and part of a seventh, the 75th section not being included in the excepted sections, and being therefore repealed also. The statute 37 Vict. c. 51, therefore, did two things; first, it absolutely repealed the 14 and 15 Vict. c. 128, s. 75, which had authorized an imposition of increase or penalty; and second, it proceeded, after having repealed it, to substitute a new law on the subject, that is to say, by its 99th section, it authorized a by-law imposing *interest* at ten per cent. on arrears.

This new legislation was in 1874 (seven years after Confederation), and the question would have been, if it had stopped there, whether, under the distribution of powers in the Confederation Act, a Provincial statute could then change or authorize change in the rate of interest; but it did not stop there. The Provincial Legislature, in 1878, passed another Act (41 Vict. c. 27), and under this the second by-law was passed, imposing increase, addition or penalty, instead of interest as under the previous Act. Sec. 3, then, of the 41 Vict. c. 27, enacted that whereas section 99 of the 37 Vict. c. 51, had intended to continue and retain in force sec. 75 of the 14 and 15 Vict., respecting the penalty of ten per cent., and whereas the wording of it might give rise to erroneous interpretation, it would substitute another section—99, for sec. 99 of the 37 Vict. It did not proceed to declare that the 14 and 15 Vict. was still in force; it did not repeal the repealing clause. If it had done so, the duty of the Court would, as far as that goes, have been plain; for, if the supreme legislative power in the Province chooses to say that a thing is one way, when it is another, I suppose the courts may say so too or at all

events say that the Legislature has said so; but they went further, and they said, not that they declared the 75th section of the 14 and 15 Vict. to be still in force, notwithstanding the express repeal of it; nor yet that they repealed the repealing section of the 37 Vict. c. 51; but they said that, for the 99th section of the 37 Vict. c. 51, they would substitute another; and what they substituted was this, viz., that the corporation might by a by-law exact an increase, addition, or penalty of ten per cent. on all arrears not paid within a certain delay. That is to say, this last statute is to be read as if it was in fact section 99 of the 37 Vict.; and the only difference between the new reading of the 99th section and the old reading, is that the old reading authorized the exaction of interest, and the new reading authorizes an exaction of an increase, addition or penalty.

Therefore, the question is left precisely where it was before, with this exception, viz., that, before the Act of 1878, the question would have been whether the Provincial Legislature could, in 1874, change or authorize any creditor to change the legal rate of *interest*; and now the question is whether the Provincial Legislature could, in 1878, authorize the exaction of an *increase, addition, or penalty* of ten per cent. for delay of payment of taxes. I do not enter upon the question whether, if they had even repealed the repealing section (which on general principles would have restored the first law), such an enactment would at that time—nine years after Confederation—have had the effect of legally changing the rate of interest; I only say that they did not repeal the repealing section; and the 14 and 15 Vict. sec. 75, remained repealed.

As to the real nature of the exaction, whether it be called interest, or increase, I must say at once that my judgment and conscience utterly refuse to yield to

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any attempt at distinction between these two things. The law itself rejects any such distinction. It is old law, and finds plain and emphatic expression in the words of a specific article of the Code (art. 1077); "The damages resulting from the delay in the payment of money, to which the debtor is liable, *consist only of interest* at the rate legally agreed on by the parties, or, in the absence of such agreement, at the rate fixed by law." If any other rate is to be fixed by law since Confederation, it must be by the Parliament of Canada. *Interest*, by par. 19 of section 91 of the B. N. A. Act, 1867, is a subject *exclusively* allotted to the legislative authority of the Dominion.

If the Provincial Parliament of 1878 thought itself competent to deal with the subject of *interest*, it had one of two things to do; it could either declare that the 14 and 15 Vict. was still in force notwithstanding its absolute repeal, or it could repeal the section of the 37 Vict. that had repealed it. What the effect of either course would have been, as I have said before, I give no opinion upon; but it is certain that the Legislature has taken neither the one course nor the other, but it has only said that the 37 Vict. intended to continue the 14 and 15 Vict. in force (not that it did so, nor yet that it, by its subsequent Act of 1878, declared it to be in force); and it has shewn that it did not consider it in force by enacting another section 99 for the old one that is supposed to have continued it in force. The Provincial Legislature might, perhaps, have taken a third course—for it can alter our local laws—however fundamental. It might, if it can deal at all with interest since Confederation, have repealed the 1077 art. of the Code, but it has not attempted to do so. Therefore, by whatever name they call the exaction in question, it is by law still interest and nothing else. They cannot change its

nature by changing its name. They are dealing (to use the very words of the law), with damages resulting from delay in the payment of money by a particular class of debtors. If they can give the corporation of Montreal, by this mere changing the name of the thing, a legal right to ten per cent. in the absence of agreement between the parties, they can give it to the Bank of Montreal, or to any other creditor they choose to designate, and the plain provision of the constitution would become a dead letter.

Although, therefore, the Quebec Legislature in 1878 says that it intended, in 1874, to do the very reverse of what it actually did, and to continue in force the 75th section of the 14 and 15 Vict. instead of repealing it as it expressly did; and although I should probably have been bound by that extraordinary statement, if it had been followed by any enactment declaring the 75th sect. still in force, or repealing the repealing section of the 37 Vict., and so restoring the original provision, it is now no longer a question of interpretation, but a question of the effect of that which requires no interpretation. Interpretation serves to shew the meaning; but when we have got that, we have only to deal with the effect of what is meant. No law of interpretation can require me to say that the statute of 1878 has repealed the repealing section (241) of the 37 Vict., when it has not only not attempted to do so but has proceeded to substitute another 99th section for the 99th section of the Act of 1874—a step that obviously could not be required, if the 75th sect. of the 14 and 15 Vict. was still in force. Therefore, in dealing with the new section 99 which has been substituted for the old one, I must say that its effect, in my judgment, is not to better, or in any manner to change, the old provision about interest, unless it can be shewn that it really means to

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do something else that they had a right to do, besides exacting interest, which they had no right to do. This has been attempted. It was said by the counsel for the corporation, that paragraph 15 of the 92nd section of the Confederation Act gave power to the Local Legislatures to impose penalties. Let us see that paragraph. Here it is. It is found among the exclusive powers of the Local Legislatures, no doubt, but what does it say? Here are the express words of the power given:—"The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Surely this never meant that people were to be punished by fine, penalty or imprisonment imposed by a treasurer or other officer of a corporation without defence, trial or hearing. Therefore it seems to me that the penalty theory will not do; that the interest authorized by the 37 Vict. c. 51, was *ultra vires;* that the new section 99, substituting increase or penalty instead of interest *eo nomine*, is no better; that the 75th sect. of the 14 and 15 Vict. c. 128, was repealed by section 241 of the 37 Vict., and has never been declared to be still in force; but on the contrary, instead of being restored by the new section 99, that section only declares that it had been previously intended to keep it in force, but does not repeal the repealing section, only substituting another provision for the 99th section of the 37 Vict., which would be inconsistent and absurd if the old provision had really subsisted.

I recognize in the fullest manner the duty of courts of justice to give effect to statutes, but it must be a legal effect—one that is rationally deducible from their terms. I cannot make a statute say what it does not say; I can only give effect to what it *does* say. The legislators 'intended,' it is said, to keep the old law in force; per-

haps so; but it was precisely because they had intended to do what they had not done that subsequent legislation became necessary; and when this subsequent legislation comes, what does it say? Not that the 14 and 15 Vict. sec. 75, is still in force, but that Parliament will substitute another section 99 for the old section 99 of the 37th of the Queen, and what it substitutes is just the same, only with the change of the word *increase*, etc., for *interest*. Now, if I could abstain from applying the rules of interpretation known to the administration of the law, and could consult only my individual experience of Provincial legislation, I might find, perhaps, little difficulty in believing that the idea of the framers of this last statute of 1878 was to repeal the repealing section (241) of the 37 Vict. c. 51, and make the 75th section of the 14 and 15 Vict. reappear in better form than it had taken in the 99th section of the 37th Vict. That, I have no manner of doubt, is what they wanted to do; it is what I would readily help them to do if they had only helped themselves; but it is not one of my numerous functions to aid by conjecture the unexpressed ideas of Parliament for the purpose of helping them to do, under another name, what the constitution forbids them to do at all. I must apply rules to my work; and besides general and well-known rules of construction, there is a specific rule in our own Provincial Interpretation Act that exactly applies to the present case. It is the 11th section: "When any provisions of law are repealed, and other provisions are substituted therefor, the provisions repealed remain in operation until the provisions substituted come into operation under the repealing law."

It is plain then, I think, that up to the passing of the 37th Vict., the 75th section of the 14 and 15 Vict. was in force; that it ceased to be in force when the 241st section repealed it, and section 99 of the 37th

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Vict. was substituted for it; that at the time of this substitution, in 1874, there was no power in the Provincial Legislature to meddle with *interest* at all, and the by-law that was passed under it was waste paper; that the Act of 1878 putting a new section 99 in the place of the old one, and calling the thing increase or penalty instead of interest, did not make it any better; that the Act of 1878 could not be held to restore or declare in force the 75th section of the 14 and 15 Vict. for two reasons: because it neither said it was in force, nor repealed the repealing law; and, secondly, if they had intended to declare it still in force, there would have been superfluity and nonsense in enacting a new provision of the same kind; that it is perfectly obvious that what the Legislature has attempted to do, is to cure or elude an illegality existing in the 99th section of the Act of 1874, and to do this by using the words, increase, addition or penalty instead of the word interest; and that there is in reality, and in point of law, no difference between them, nor any greater power either possessed or given in 1878 than was possessed or given by the Legislature in 1874.

I am therefore of opinion that the first by-law imposing interest (*eo nomine*) is bad—(and under it almost all this charge is made.) I am also of opinion that the 2nd by-law is equally bad in imposing increase or penalty, and that the contestation must be maintained. It is unnecessary, of course, to go into the other points.

R. Roy, Q.C., for claimants.

Lunn & Cramp for plaintiffs contesting.

QUEBEC SUPERIOR COURT.

THE ROYAL CANADIAN INSURANCE CO. *v.* THE MONTREAL WAREHOUSING CO.

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April 30.

[*Reported 3 Legal News, 155.*]

Interest, right to legislate respecting—B. N. A. Act, s. 91, sub-s. 19, —37 Vict. c. 57, s. 3, Q.

The general law having provided that on any contract or agreement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bearing the agreed rate of interest, was held to be within the competence of the Provincial Parliament.

A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalized as to other persons having the right to borrow.

JOHNSON, J.:—

The present action is to recover the amount of twenty-five *coupons*, or interest warrants, attached to the bonds issued by the defendants' company.

The declaration alleges that the defendants duly signed, sealed and issued the bonds on the 1st October, 1874, under the authority of the Act of the Province, 37 Vict. c. 57, and they were payable in thirty years, with interest in the interval at the rate of seven per cent. per annum, semi-annually on the 1st of April and the 1st of October: that the plaintiff is the lawful holder of twenty-five of these bonds, and £7 sterling became due on each of them for six months' interest on the 1st of April last, and presentation was made at the place of payment, and

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the whole amount of interest on the twenty-five *coupons* is £175 sterling. The conclusion is for the equivalent of that sum in currency, with interest from the date of process, and costs.

The first plea of the defendants is that the plaintiffs are a corporation, and cannot by law take more than 6 per cent. for the advance or forbearance of money for a year; and the bonds in question were corruptly and usuriously issued upon a contract between plaintiffs and defendants to take 7 per cent. That the Provincial statute 37 Vict. c. 57, was beyond the powers of the Quebec Legislature, and could give no authority to the defendants to agree to pay a higher rate of interest than 6 per cent.; the making of laws respecting interest being a power specially reserved to the Parliament of Canada; and therefore the coupons are of no value, and void; and no action can be maintained on them.

By a second plea, the defendants say, after repeating the absence of power by the Provincial Legislature to pass the 37th Vict. c. 57, that the bonds are void for any excess of interest over 6 per cent; but that nevertheless, ever since they were issued, the defendants have been paying, and the plaintiffs have been taking this excess, amounting now to a larger sum than is asked by the action, and which the defendants have a right to set off against the sum demanded.

The answers are general. Therefore, there would appear by the pleadings to be three questions: 1st, whether the acquiring of these bonds by the plaintiffs is to be considered as a loan of money by them to the defendants; 2nd, if it is so considered, whether it is void for usury either in the taking, or in the giving more than 6 per cent. (for both points are raised); and 3rd, whether the Act gives legal power to make the contract that has been made between these parties. This is the order in

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which the pleadings present these questions; but I think it is obvious that the last must come first, for if the contract in its present form has the express sanction of the Legislature acting within its powers, it would be quite superfluous to enquire whether, without the Act 37 Vict. c. 57, the transaction ought to have been looked on as a loan, or whether it would have been void entirely for usury, or only for the excess paid over 6 per cent., or for anything else that might have happened if the Act had not been passed. In a word, if by law it is a valid contract, it must be enforced, so that question would appear not only to be first in point of order, but first and last and decisive of the whole case, if it should be found for the plaintiffs.

The 37 Vict. c. 57 (Quebec) is in these terms: "Whereas the Montreal Warehousing Company have by their petition represented that it is necessary for the proper conduct and management of their affairs that certain further powers be granted to them in respect to the holding of property, and in respect of the borrowing of money," etc., etc., then comes the power by section 1 to purchase and hold property of the annual value of $200,000. Then, by the 2nd section, the power to issue bonds or debentures; and finally by the 3rd section, the power to agree upon the rate of interest. This would perhaps include both parties, unless we can conceive of a power to borrow, and to agree upon the terms on which the money is borrowed that would bind only one of the parties; and, therefore, it might appear reasonably enough that it was meant to legalize this precise form of transaction as far as both of the parties are concerned; and much can be said in support of that view of the case; for the defendants may be said to have in a manner acknowledged not only the sufficiency but the extent of the authority. They asked for it; they got it; they used

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it; they said, this is the precise thing we want to enable us to get money; and the only way we can get it is by being allowed to make an agreement with the lender as to the rate of interest. When they asked for power to make this agreement, what sort of agreement, it may be asked did they mean? An agreement that should be no agreement? a thing that never could be enforced? good enough for the borrower to get the money, but worthless for the lender to get it back? Surely they must have understood, in asking for the authority to make this agreement, and the Legislature must have understood in granting their request, an agreement that was to be good and binding on both parties to it.

The authority to borrow may be said to be a complex one, including in its terms, and of necessity, not the act of one alone, but the act of two, unless, as I said before, we can conceive an authority to borrow without a corresponding power to lend—in fact an authority to borrow from nobody—as if this Act had said to the defendants: "You may borrow, but take care you do not ask anyone to lend to you." If the authority here given, however, is not that delusive sort of authority if it is a real and effective authority, it is one to borrow from any one who will lend, and to make an agreement, as to the interest with any one who will enter into such an agreement, and who, is, therefore, necessarily empowered to make it. This appears to me to be what might reasonably have been meant by this statute. If it has been made legal to borrow an interest to be agreed upon, it must have been made legal so to lend, unless you can have a borrower without a lender The defendants have used this power; it has answered its purpose very well as far as they are concerned. They have got the money; it is only when the lender wants the power to extend to the whole transaction, and to pro-

tect him as well as them, that it is perceived how worthless the authority has been for all purposes but their own. Here is a power to make a valid agreement. How can a man agree alone? If the power means anything, it probably means an approval by the Legislature of what both parties consent to; for it is only what both parties consent to that could constitute an agreement.

I quite admit, however, that the precise legal points raised in this case must be decided on equally precise legal grounds; and though I have made these observations upon general principles of justice, I cannot of course decline to look at this statute as one conferring merely a power on the defendants, and nothing more, and therefore not depriving them of the legal right to question the power of the lender. The third section then, I hold, empowers the defendants on their part, and as far as depended upon them, to make an agreement. It puts them on the same footing as natural persons who required no authority (the law having already conferred it on such persons,) and therefore the next thing to consider is whether this is a loan or bargain between the plaintiffs and defendants (for that is the ground it is put upon in the plea)—a corrupt bargain to take unlawful interest. As far, however, as concerns the legality of their own act in borrowing under a power that they asked for, and got, and used for their own benefit, I have not a shadow of a doubt. They invoked it themselves, as sufficient for their purpose at all events; but in using the power they got, if they have agreed with another party who had no right to make that particular agreement, they must be heard when they raise that question.

The pretension that the Quebec Legislature could not convey the power they asked for may sound strangely in the mouth of the asker; but apart from that I hold that the local Parliament had the power. This was not a law

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to alter the rate of interest at all; it was not even a law to alter the rate of interest as between these parties. any rate of interest that might be agreed upon was at that time legalized between any parties having the right to lend and to borrow; it was merely a law to enable the defendants to borrow, and in doing so, to do what others might then have done without this permission. General legislation on the subject of interest was all that had been reserved to the Dominion Parliament by the Confederation Act; and this Provincial statute, on the express authority of the case of *L'Union St. Jacques* v. *Belisle* (1,) decided by the Privy Council, clearly does not come within the prohibition; but on the contrary, under No. 16, of section 92, it is a matter of a merely local and private nature in the Province, and is within the capacity of the Provincial Parliament. It does not change the rate of interest, but merely empowers a local corporation to borrow at a rate of interest already legalized, *i. e.*, a rate that might be fixed by agreement. To make a general law regulating interest is one thing while to give authority to borrow, and to agree to the lender's terms, within the limits of the law, is certainly quite another thing. So much then for the authority possessed by the Quebec Legislature, and the authority conveyed by it, to say nothing of the authority admitted by the asking for it; so much for the authority to borrow. (2)

Of course these observations dispose not only of the question of power to borrow, but also the point of

(1) L. R. 6 P. C. 31; *ante*, vol 1, p. 63.

(2) McDOUGALL v. THE MONTREAL WAREHOUSING COMPANY (3 L. N. 64.)

1880, Feb. 16. The plaintiff claimed the sum of $170.33, amount of coupons due on bonds. The defence was that the bonds were issued under 37 Vict. c. 57 (Quebec), and that the Legislature could not enact a law authorizing the company to enter into any contract binding on the company by which a rate of interest higher than six per cent. was

usury in so far as concerns the act of the borrower. Indeed, I never understood clearly how the contract could be said to be vitiated by usury in the borrower agreeing to take the money, even if he had no authority to borrow. The penalties of usury attached to the lender; he lost three times the sum lent; what had the borrower to lose? The only remaining question, therefore, is the question of usury in the lender taking over 6 per cent. on a loan.

[The remainder of the judgment is occupied in discussing this question. The learned Judge was of opinion that the contract was perfectly legal and binding on the defendants.]

Bethune & Bethune, for plaintiffs.

Lunn & Cramp, for defendants.

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to be paid, and that the coupons being at the rate of seven per cent. the obligation was void, or at most good only for six per cent. The answer to this was that the company was authorized to borrow, and could legally agree to pay seven per cent., or such other rate as might be specially agreed on, which was all that was done here.

MACKAY, J., maintained the pretension of plaintiff, and judgment went for the amount sued for, $170.33.

R. A. Ramsay, for plaintiff.

Lunn & Cramp, for defendants.]

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Dec. 18.

QUEBEC SUPERIOR COURT.

BLOUIN *v.* THE CORPORATION OF THE CITY OF QUEBEC.

[*Reported 7 Quebec Law Rep. 18.*]

Intoxicating liquors, sale of, power to regulate—38 Vict. c. 74, Q.

The Provincial Legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may, for this purpose, restrict the sale of spirituous liquors.

The provision of the Quebec Statute, 38 Vict. c. 74. s. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays and on every day from eleven of the clock at night until five of the clock in the morning, is within the competence of a Provincial Legislature.

MEREDITH, C. J.:—

This is an action for the recovery of certain sums of money alleged to have been illegally exacted by the defendants from the plaintiff.

The declaration alleges that, in the year 1876, the defendants instituted two prosecutions, in the Recorder's Court, in this city, under the 38 Vict. c. 74, s. 4, against the plaintiff, charging him with having kept open on Sunday, a house in the city of Quebec, in which the plaintiff was then in the habit of selling spirituous liquors, and that in each of those cases the defendant was condemned to pay a penalty of $10, and $1.45 costs, which penalties and costs were in consequence paid by the plaintiff.

The declaration further alleges that, in the year 1877, the defendants instituted another prosecution, in the same court, and under the same statute, against the plaintiff; charging him with having kept open *une auberge*, a public house, in which he was then in the

habit of selling spirituous liquors, between eleven o'clock in the night of the 20th October, 1877, and five o'clock of the following day, and that, in the year 1878, the defendants caused another prosecution to be instituted against him for a like offence; that, under the first of the last mentioned prosecutions, the plaintiff was condemned to pay a penalty of $15, and $1.45 costs, and in default of paying the said sums, the plaintiff was condemned to be imprisoned in the common gaol of the district of Quebec, there to be kept at hard labour, for the term and space of three months, unless the said fine and costs were sooner paid. And that, under the second of the said last mentioned prosecutions the plaintiff was condemned to pay a penalty of $50.65 under pain of imprisonment, with hard labour, as in the other cases.

The declaration alleges that, in order to avoid imprisonment with hard labour, with which he was threatened in all those cases, he paid all the penalties and costs, which he had been so condemned to pay, that all the said payments were made through error, on his part, without any lawful cause, or consideration, he being under the erroneous belief that the said prosecutions had been legally instituted, and that the said statute had force of law. Whereas it is alleged that the said prosecutions were wholly unlawful, and that the statute under which they were instituted was unconstitutional, and *ultra vires* of the Legislature of the Province of Quebec.

The defendants, in addition to an exception, have filed a *defense en fait;* and the main question which the case presents is as to whether the Legislature of the Province of Quebec had power to make the enactments contained in the 4th sec. of the 38 Vict. c. 74, upon which the prosecutions so instituted were founded.

In the case 1223, *Collopy v. The Corporation of Quebec* (not reported), Mr. Justice Stuart maintained the writ

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of prohibition, on the ground that the Recorder's Court had no jurisdiction to condemn the defendant to be imprisoned at hard labour. That judgment has been generally regarded, and for the purposes of the present discussion I shall consider it, as being a correct exposition of the law on the subject.

In *Ex parte Cooey* (1), Mr Justice Dunkin held "that the regulation of the traffic in intoxicating liquors is within the jurisdiction of the Parliament of Canada," but that judgment, as I think, has no tendency to establish that the Provincial Legislature may not require taverns to be closed on Sundays and during the hours of rest. In the case of *Collopy* v. *The Corporation of Quebec*, Mr. Justice Stuart, as I am authorized to state, at the same time that he held the condemnation to imprisonment to hard labour to be unjustifiable, expressly said that he regarded the provisions of the law, as to the closing of taverns on Sunday, and during the night, as mere police regulations; and therefore within the power of the Provincial Legislatures.

It is true that one of the *considérants* in *Poitras* v. *The Corporation of Quebec* (2), supports the contention of the plaintiff; but without wishing to at all underrate the importance of that *considerant* as an authority, I may mention that the judgment in *Poitras* v. *The Corporation of Quebec* contained another reason quite sufficient to support it; and that, therefore, the *considerant* in question, may perhaps not have received as much attention as it otherwise might have received.

But the case mainly relied on by the plaintiff, and which, at least as I understood, was cited as deciding the matter now in controversy, was *The City of Fredericton* v. *The Queen* (3).

(1) 21 L. C. J. 182, *post*, p. 385. (2) 9 Rev. Leg. 531; *post*, p. 376.
(3) 3 Can. S. C. R. 505; *ante*, p. 27.

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I have, therefore, attentively read the judgment in that case, but do not think it can be of much, if indeed of any, advantage to the plaintiff.

That judgment decides that the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, but it does not follow that the Provincial Legislatures could not pass a law such as that under which the plaintiff was condemned. No such contention was advanced by Mr. *Lash*, the learned counsel for the city of Fredericton. He, on the contrary, admitted (p. 510) "that the Local Legislatures have certain powers, the exercise of which would tend to prevent drunkenness."

But he maintained that it did not therefore follow, "that the sole right to legislate so as to prevent drunkenness rests with the Local Legislatures," and he added "*The Legislatures* may attain that end in one way, *Parliament* may attain it in another."

The judges of the Supreme Court, who rendered the last mentioned judgment, seem to hold that there are some subjects as to which the Parliament and the Provincial Legislatures have concurrent powers to legislate, but that where the laws of Parliament conflict with those of a Local Legislature, the latter must give way.

The learned Chief Justice in the course of his observations is reported to have said (p. 540): "In my opinion, if the Dominion Parliament, in the exercise of and within its legitimate and undoubted right to regulate trade and commerce, adopt such regulations as in their practical operation conflict or interfere *with the beneficial operation of local legislation*, then *the law* of the Local Legislature must *yield to the* Dominion law." The learned Chief Justice, it is to be observed, does not say that the law of the Local Legislature, in such case, would necessarily be null *ab initio*, but simply, that the

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law of the Local Legislature *must yield* to the Dominion law. The same learned judge added: "In other words the right to regulate trade and commerce is not to be overridden by any local legislation in reference to any subject *over which power is given* to the Local Legislature" (1).

Mr. Justice Gwynne (p. 562), in his classification of the subjects as to which powers to legislate are given by the B. N. A. Act, 1867, gives, under head No. 3, "subjects assigned *concurrently* to the Dominion Parliament and to the Provincial Legislatures."

In the judgment of Mr. Justice Taschereau in the same case (p. 558), I find the following passage: "This court has repeatedly held that the Dominion Parliament has the right to legislate on all the matters left under its control by the constitution, though in doing so it may interfere with some of the *powers left to the Local Legislatures*." And at page 257, of the 4th vol. of the same reports, Mr. Justice Fournier is reported to have said: "Dans l'exercice de sa juridiction, le parlement fédéral a sans doute le pouvoir de toucher incidemment à des matières qui *sont de la juridiction des provinces*, mais ce pouvoir ne s'étend pas au-delà de ce qui est raisonnable et nécessaire à une législation pour les fins du commerce seulement."

The foregoing citations are given as shewing that although the Parliament of Canada, under its power to regulate trade and commerce, alone has the power to prohibit the traffic in intoxicating liquors, yet that the Provincial Legislatures under the powers given to them, may for the preservation of good order in the municipalities specially under their control (2), make reasonable police regulations, although such regulations to some extent affect the sale of spirituous liquors, provided they

(1) See also 4 Can. S. C. R., p. 240. (2) Sec. 92, No. 8.

do not improperly interfere with trade and commerce, which the provincial law in question certainly does not do, because the provision which requires taverns to be closed on the Lord's day, and during that part of the night which the laws of nature require should be devoted not to traffic in spirituous liquors, but to rest, do not improperly interfere with commerce; but, on the contrary, tend to promote it, by the preservation of peace and order. I have thought it right to endeavour to make the point under consideration plain, because some persons seem to think it impossible that Parliament and the Provincial Legislatures, can for any purpose whatever, or under any circumstances whatever, legislate in relation to the same matter.

The question to be decided in this case, was very pointedly brought under the consideration of the Supreme Court in the same case. Mr. *Kaye*, Q.C., in the course of his argument, observed (p. 521): "Municipalities have power to prevent the sale of liquor on Sunday; and I do not think it would be, for a moment, contended that the Local Legislature had not power to authorize those restrictions. If it is held that this was a regulation of trade, and that the Dominion Parliament had power to override the provincial laws, and to legalize the sale of liquor on Sunday, it will considerably astonish the people who advocated confederation." Mr. *Christopher Robinson*, Q.C., one of the most eminent members of the Bar of Ontario, maintained (p. 525), as if he deemed it beyond doubt, that "prohibition of trading on Sunday, and of selling liquors within prescribed hours," was under the supervision of the Local Legislatures.

And it will be recollected that Mr. *Lash*, Q.C., on the opposite side, admitted "that the Local Legislatures have certain powers, the exercise of which would tend to prevent drunkenness."

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The Supreme Court, in the case already so often referred to, was not required to adjudicate upon the propositions thus advanced, but it seems to me that the observations of Mr. Justice Gwynne, at pp. 572 and 573, shew that he was of opinion that the Local Legislatures have power to make rules and regulations for municipal or police purposes, although they may restrain the traffic in intoxicating liquors.

The learned Chief Justice, towards the close of his observations in *The City of Fredericton* v. *The Queen*, referred to his judgment in the case of *Regina* v. *The Justices of King's County*, which he said he had carefully reconsidered, and I find in that judgment a passage having a most important bearing on the present case. It is as follows: "We by no means wish to be understood that the Local Legislatures have not the power of making such regulations for the government of saloons, licensed taverns, etc., and the sale of spirituous liquors in public places, as would tend to the preservation of good order and prevention of disorderly conduct, rioting or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate" (1).

These observations, which are quite in accordance with the views expressed by Mr. Justice Stuart in *Collopy* v. *The Corporation of Quebec*, seem to me perfectly applicable to the present case; and I am the more willing to be guided by them, as I myself am, and from the first have been, clearly of opinion that the provisions of the Quebec statute requiring houses where spirituous

(1) 2 Pugsley, 535; *post*.

liquors are sold to be closed on Sunday, and for certain parts of the night, are nothing more nor less than police regulations; and as such completely within the power of the Provincial Legislatures.

As bearing upon the contention that the Local Legislatures have no power to restrain in any way whatever the sale of intoxicating liquors, I may observe that more than ten years ago our Provincial Legislature passed a law declaring "That whosoever shall unlawfully sell or give to any person interdicted under this Act intoxicating liquors, shall incur for each offence a penalty of $40."

This statute has been generally acted upon, without, so far as I know, it having ever been contended that it is unconstitutional, and yet it seems to me to be in principle open to exactly the same objections, whether founded or unfounded, that are now urged against the statute under which the plaintiff was convicted.

It may, however, be said that as, in some of the cases, the plaintiff was condemned to hard labour, in the event of his not paying the penalties for which the convictions were rendered, that he ought now to recover the sums so paid. If, as I think, the Provincial Legislature had power to pass the statute, ordering houses in which spirituous liquors are sold, to be closed on Sunday and during a part of the night, and to impose a penalty for any infraction of that law; and if the plaintiff violated the law so passed, and incurred penalties which he has paid; he has, as regards the payments so made, done what he ought to have done, and what by law he was bound to do.

It has not, I believe, been contended that if the provision of law in question be otherwise valid, it ought to be deemed wholly void, in consequence of the addition of a penalty which the Provincial Legislature had not power to impose. The part of the law which is objec-

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tionable is easily separated from the remainder, and where that is the case, as well according to the law of England (1) as according to our own law (2), the part which is void cannot defeat that which is valid. Upon the whole, I am of opinion that the action of the plaintiff cannot be maintained (3).

Montambault, Langelier & Langelier, for plaintiff.

Pelletier & Chouinard, for defendants.

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(1) *Queen* v. *Robinson*, 17 A. & E., N. S. 466. 3 A. & E. 79. 8 B. & C., 78.

(2) 7 Rev. Leg., p. 620.

(3) POITRAS *v.* CORPORATION OF QUEBEC.

[*Reported 9 Revue Legale, 531.*]

[*Translated.*]

1879, Jan. 27.--The Court [CARON, J.] considering that the applicant by his writ of prohibition in this cause, prays that the defendants may be ordered to arrest and suspend the conviction pronounced against him by the Recorder's Court, on the 20th May last, condemning him to pay $40 and costs, and in default of payment to be imprisoned for three months with hard labour;

Considering that it does not appear by the allegations of the summons or complaint on which the aforesaid conviction is based that the aforesaid Recorder's Court had jurisdiction, seeing that the mere fact of the demandant having kept open his house on Sunday did not constitute an offence punishable in the manner stated in this complaint;

Considering that it is in evidence that the demandant then occupied the said house with his family, that he there received boarders, and that his bar was kept in a room apart from those occupied by his family, his boarders and himself;

Considering that the defendant had the right to leave his house open on Sunday, and that under sec. 4 of cap. 74, of 30 Vict. (ground of said complaint) he could at most be bound to close his bar only;

Considering that the Local Legislature of Quebec in order to enforce the execution of a law passed by it cannot inflict punishment except by fine, penalty or imprisonment only, and not by imprisonment with hard labour;

Considering that it is equally without power to prohibit or to restrain the sale of intoxicating liquors in any manner whatever, unless by imposing licenses in order to raise a revenue for provincial, local, or municipal objects;

Considering that the defence is ill-founded, and that the demandant has proved the essential statements of his petition;

The defendant's defences are dismissed, and the prayer of the demandant's petition granted with costs.*

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* We are informed that the constitutionality of the law ordering inns to be closed on Sunday was first questioned by M. F. Langelier, in Collopy *v.* Quebec. M. Langelier applied for a certiorari against the

Recorder's decision, relying on the nullity of the law, and argued, first, that the Local Legislature had no right to meddle with the question; and secondly, that if it had, it had in any case no right to enforce obedience to its law by imprisonment with hard labour.

Judge McCord granted the certiorari, thereby deciding provisionally, at any rate, that the law appeared to him to be void.

Subsequently the case came before Judge Casault, who quashed the certiorari, but not because he approved of the Recorder's judgment. On the contrary he so expressed himself as to shew, that in his opinion the law was worthless; for he said that he dismissed the certiorari, but without costs, and reserving the right to obtain a writ of prohibition, in order, as he said, to allow the question to be carried to appeal.

After this judgment, M. Langelier at once obtained a writ of prohibition. The corporation pleaded a justification. This defence was discussed before Judge Stuart, who, without finally deciding, seemed strongly inclined to declare the law unconstitutional.—*Note to Report.*

[The Ontario Court of Appeal has decided that Provincial Legislatures can impose hard labour in addition to imprisonment. R. v. Frawley, 7 App. Rep. 246; *post.*]

QUEBEC VICE-ADMIRALTY COURT.

1881
Nov. 11.

THE FAREWELL.

[*Reported 7 Quebec Law Rep. 380.*]

Navigation and Shipping, jurisdiction respecting—36 Vict. c. 54, D.

The Dominion Parliament can confer on the Vice-Admiralty Courts jurisdiction in any matter of navigation and shipping within the territorial limits of the Dominion.

When an Act of the Parliament of Canada is in part repugnant to an Imperial Statute, effect will be given to the former so far as its provisions do not conflict with those of the Imperial enactment.

STUART, J. :—

The promoter, a pilot, was engaged by the respondent, owner of the "Farewell," to pilot her from Quebec to Bic, the limit of the pilotage district in the Lower St. Lawrence. At Bic he was, without his consent, taken to sea on the 21st of November. On the 14th of December, at sea, he was transferred to the "Bolgaya," of Dundee, taken to St. Thomas, thence to Havana, by a steam vessel to New York, and by rail arrived at Quebec on the 22nd January last. By the 40th section of the Dominion "Pilotage Act, 1873," it is enacted that "no pilot shall, without his consent, be taken to sea, or beyond the limits for which he is licensed, in any ship whatever; and every pilot so taken shall be entitled to cabin passage, and over and above the pilotage dues otherwise payable to him to the sum of two dollars a day, to be computed from and inclusive of the day on which the ship passes the limit up to which he was engaged to pilot her." In the terms of this provision the promoter has claimed a

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sum of $280.45. For pilotage dues there is no claim. By act on protest the respondent declines this jurisdiction on the ground that the Dominion Parliament has no legislative authority to enlarge or restrict the powers of this Court as one of Imperial creation. If this be true, this Court cannot enforce the 40th section of the Dominion "Pilotage Act, 1873," which awards the indemnity demanded, and no remedy, either *in rem* or *in personam*, can be afforded in this suit under that Act.

By the B.N.A. Act, 1867, exclusive legislative authority in the Parliament of Canada extends to the regulation of navigation and shipping. As an incident to this power the Courts of Vice-Admiralty necessarily come under its control, as may be seen on reference to the case of the *Hibernian* (1), determined by this Court, and its decision affirmed by the Privy Council. The case of the *Eliza Keith* may be referred to on the same point (2); and as conclusive the cases of the *Samuel Gilbert* and *Franklin B. Schenck* wherein, upon the information of Sir John A. Macdonald, the Attorney-General, two American vessels were declared forfeited by the judgment

(1) L. R. 4, P. C. 511. [The case of the *Hibernian* was decided on the statute of the late Province of Canada, 27 and 28 Vict. c. 13. In the judgment of the Privy Council it is said (p. 517): "In the present case, the law invoked is contained in an Act of the Legislature of a colony belonging to the Crown, and ratified by the express sanction of Her Majesty.

"Their Lordships have no doubt whatever that this law, in every case to which it is applicable, is of binding authority, equally in the Queen's High Court of Admiralty and in the Vice-Admiralty Court of Canada."

The judgment does not discuss the authority of the Parliament of Canada under the B.N.A. Act.]

(2) 3 Q. L. R. 143. [In this case it is said (p. 144 of the Report): "Subsequent to these statutes (the English Merchant Shipping Act, 1854, and the Merchant Shipping Act Amendment Act, 1862,) the B.N.A. Act, 1867, was passed. This conferred upon the Parliament of Canada legislative authority over all matters occurring in Canadian waters, within the subject of navigation and shipping, and in 1868 its co-operation was required to give effect to the same rules of navigation as had been in use in England." The B. N. A. Act is not further referred to in the judgment.]

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of this Court for an infraction of the Dominion "Act respecting fishing by foreign vessels," 31 Vict. c. 61. In all these cases, however, it is to be observed that the jurisdiction was exercised in matters within the territorial limits of the Dominion, which "do not extend beyond three marine miles (or a marine league) from the coasts, such being the distances to which, according to the modern interpretation and usage of nations, a cannon shot is supposed to reach" (1).

Another section of the "Pilotage Act, 1873," the 42nd, declares that so soon as the vessel passes out of the pilotage district, the service is performed which disconnects the pilotage dues from the subsequent indemnity for being taken to sea. The consequence of which is that the Dominion Parliament Pilotage Act, 1873, awards an indemnity either for an injury sustained upon the high seas or for an obligation there incurred, the exercise of a power beyond the territorial limits of the Dominion, and so far void unless relieved by Imperial legislation.

By the Merchant Shipping Act, 1854, s. 357, it is enacted that "No pilot, except *under circumstances of unavoidable necessity* shall, without his consent, be taken to sea or beyond the limits for which he is licensed, *in any ship whatever*; and every pilot so taken, *under circumstances of unavoidable necessity* or without his consent, shall be entitled, over and above his pilotage, to the sum of 10*s.* 6*d.* a day, to be computed from and inclusive of the day on which such ship passes the limit up to which he was engaged to pilot her up to and inclusive of the day of his being returned in the said ship to the place where he was taken on board, or up to and inclusive of such day as will allow him, if discharged from the ship, sufficient time to return thereto; and in such last mentioned case, he shall be entitled to his reasonable travelling

(1) Forsyth's Con. Law, 25.

expenses." From this enactment, the clause of the Dominion Pilotage Act, 1873, varies in this, that it allows an indemnity to the pilot when taken to sea without restriction, while the Imperial Act provides the indemnity only under circumstances of unavoidable necessity. Then the *per diem* allowance of the one Act is two dollars, and that of the other is ten shillings and sixpence sterling. As respects the specific allowances of the Dominion Act, they may be brought under the head of travelling expenses allowed in the other. It may be further noticed that the disconnecting of the pilot service from the indemnity does not appear in the Imperial statute.

[The learned Judge then, after examining the question whether the Court had jurisdiction over the present matter, and concluding that it had, continued, p. 383 :—]

I proceed now to state the grounds of my decision on the act on petition. By the Imperial Act 28 & 29 Vict. c. 63, intituled "An Act to remove doubts as to the validity of colonial laws," it is enacted that any colonial law "repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy," be void. Upon this authority I shall give effect to the Dominion Act so far only as it is not in conflict with the clause of the Merchant Shipping Act, which, in this case, amounts to no more than the difference between the *per diem* allowance of two dollars, and ten shillings and sixpence sterling, which it is quite competent to the promoter to abandon as he has done by his preference for the Dominion Act upon which he has proceeded. Consequently the act on protest is overruled with costs.

QUEBEC CIRCUIT COURT.

1876
October.

HART *v.* THE CORPORATION OF THE COUNTY OF MISSISQUOI.

[*Reported 8 Quebec Law Rep. 170.*]

Intoxicating liquor—Prohibition—Temperance Act of 1864.

A Provincial Legislature cannot repeal or modify those sections of the Temperance Act of 1864, 27-28 Vict. c. 18, which conferred on Municipal Councils the power to pass by-laws for prohibiting the sale of intoxicating liquors (1).

[*Translated.*]

CARON, J.:—

On the twenty-third of March, 1876, the municipal council of the county of Missisquoi passed a by-law prohibiting the sale of intoxicating liquors within the said county, under the authority of the Act 27 & 28 Vict. c. 18, otherwise known as "The Temperance Act of 1864."

The plaintiff, *Moses O. Hart*, moved to quash this by-law on the ground [amongst others] that the ten first sections of the Temperance Act above cited are repealed by article 1086 of the Municipal Code.

[The learned Judge, after considering the effect of article 1086 of the Municipal Code, and concluding that it did not repeal, and was not intended to repeal, the ten first sections of 27-28 Vict. c. 18, continued as follows:—]

The respondent, however, goes further, and maintains

(1) [As to the power of Provincial Legislatures to prohibit the sale of intoxicating liquors, see Corporation of Three Rivers *v.* Sulte. *ante*, p. 280.]

that the Local Legislature had no power to pass any law which might affect the ten first sections of the Temperance Act of 1864, inasmuch as they are concerned with the mode of regulating the sale of intoxicating drinks, and that the Federal Parliament alone has power to legislate on this subject.

For the decision of this question, it is necessary to determine first of all the extent of the respective powers of the Parliament of Canada, and the Local Legislatures. By the second and third sub-sections of the ninety-first section of the B. N. A. Act, 1867, the provisions respecting trade and commerce, and the formation of a revenue by taxation, are under the exclusive control of the Parliament of Canada. This power is general, and without restriction, and must of necessity include as well the internal trade and commerce of each Province as that of the whole Dominion.

Nothing in my opinion supports the claim of authority which a Provincial Legislature would make by legislating on internal commerce. The Local Legislatures have no powers other than those given to them by this Act. They can indeed make laws relating to the granting of shop and tavern licenses, etc., but only in order to the raising of a revenue to meet the expenses of the Province (see sub-sec. 9 of sec. 92). They have also power to legislate for the preservation of order in places where intoxicating liquors are sold, provided, however, that these laws do not affect trade or commerce.

The permission, as well as the prohibition of the sale of intoxicating liquors, evidently affects trade and commerce, and constitutes, therefore, part of the laws which govern imports and excise. The Local Legislatures in prohibiting or limiting the sale of intoxicating liquors affect trade and commerce, since they restrain and paralyze the rights of the Federal Parliament respecting the

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Caron, J.

imposition of import duties. It seems clear to me that, as the powers granted to county councils by the first ten sections of the Temperance Act of 1864, to prohibit the sale of intoxicating liquors, are concerned with trade and commerce (1), they can neither be modified or repealed by the Legislature of the Province of Quebec. The Honourable Judge Ritchie, now belonging to the Supreme Court, has given a decision to the same effect in New Brunswick in 1875 (2). The Honourable Judge Bourgeois has also decided at Lachute on the 15th of September, 1876 (3), that county councils still possess the right to prohibit the sale of intoxicating liquors.

(1) [See Citizens' Ins. Co. *v.* Parsons, 7 App. Cas. 96; *ante*, vol. 1, p. 265.]
(2) [Reg. *v.* Justices of King's County, 2 Pug. 535; *post.*]
(3) [Sauvé *v.* Corporation of the County of Argenteuil, 21 L. C. J. 119.]

QUEBEC CIRCUIT COURT.

EX PARTE COOEY, JR.....*Petitioner;*

1877
July 20.

v.

THE MUNICIPALITY OF THE COUNTY OF BROME,
Respondents.

[*Reported 21 L. C. Jurist, 182.*]

Intoxicating Liquors—Prohibition—Temperance Act of 1864.

A Provincial Legislature cannot repeal those sections of the Temperance Act of 1864, 27 and 28 Vict. c. 18, which conferred on Municipal Councils the power to pass by-laws for prohibiting the sale of intoxicating liquors. (1)

The petitioner, a municipal elector of the County of Brome, petitioned under article 698 of the Municipal Code of Quebec for the annulment of a by-law passed under the authority of the Temperance Act of 1864.

Mr. *O'Halloran*, Q.C., for petitioner.

Mr. *Lynch*, for respondents.

DUNKIN, J.:—

[After reviewing the legislation with respect to municipal law prior to 1867 so far as it affected the questions before the Court in the present case, the learned judge proceeded as follows, p. 184:—]

With the law in this state, came the great change in our legislative system, brought about by Confederation.

(1) [As to the power of Provincial Legislatures to prohibit the sale of intoxicating liquors, see Corporation of Three Rivers *v.* Sulte, *ante*, p. 280.]

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Dunkin, J.

A precise appreciation of this change, in one of its many aspects, is necessary in order to the forming of a right and thorough judgment on the matter here involved.

The 129th section of the B. N. A. Act, 1867, maintains in force all laws subsisting at the Union, subject (save in so far as they might be of imperial enactment) to repeal or amendment by the Parliament of Canada or by the Legislature of the proper Province—according to the authority of either under that Act.

The 91st section declares that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects" therein enumerated—"the regulation of trade and commerce" being the second of them. And, as if to give extreme emphasis to this plain and strong enactment, it adds unnecessarily, that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

The 92nd section goes on to provide, that "in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated," four of these being —"8. Municipal institutions in the Province,—9. Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes,"—"13. Property and civil rights in the Province,"—and "16. Generally, all matters of a merely local or private nature in the Province."

It must be admitted that the wording of these sections is open to criticism. It has been said, and truly said, that the exclusive power to legislate as to "shop, saloon, tavern, auctioneer and other licenses" is necessarily a

power of interference, to a certain extent, with "the regulation of trade and commerce." But at least this much is clear and certain, that such power of interference is narrowly enough and precisely enough restricted by the after words, "in order to the raising of a revenue for Provincial, local or municipal purposes." Legislative power over licenses is obviously given to that end only. The indirect interference with trade which it involves can go no further.

There is, again, a possible sense of words, under which the exclusive power to legislate as to "property and civil rights in the Province" might involve a power to legislate at least in some measure for "regulation of trade and commerce" therein. But a sense must be sought, on the one hand, for the words "trade and commerce," (1) and on the other for the words "property and civil rights" which shall not involve this consequence. And such sense readily presents itself. The distinction between commercial and ordinary (that is to say, civil non-commercial) law, familiar to everybody, rests upon it. Whatever of civil law affecting men's trading and commercial relations is not common to these and to men's relations otherwise, is law regulative of trade and commerce. Whatever else of civil law affects men's property and civil rights, is what we call law regulative of property and civil rights. The former here rests wholly with Parliament. Only the latter rests with the Legislatures, and even that subject to heavy further reduction, on the score of fisheries, currency and coinage, paper money, weights and measures, promissory notes, interest, legal tender, insolvency, patents of invention and discovery, copyrights, naturalization, marriage and divorce, etc., all reserved exclusively, by section 91,

(1) [See Citizens' Insurance Co. *v.* Parsons, 7 App. Cas. 96; *ante*, vol. 1, p. 265.]

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for Parliament, and all trenching widely on what otherwise would have fallen (under section 92) within the range of property and civil rights.

Nor is there wanting a sense of the words "Municipal institutions in the Province" which would extend them also over ground assigned exclusively to Parliament, and notably would limit its trade and commerce powers. Under legislation not federally limited in that behalf, all sorts of powers are of course more or less delegated to municipal bodies, whenever convenience may seem so to require. But for a Legislature of strictly limited jurisdiction, nothing is clearer than that it can delegate no powers beyond those it can directly exercise. Our Legislature can delegate no power of regulation of trade and commerce, nor over fisheries, nor weights and measures, nor anything else matter of merely Parliamentary legislation. Each Provincial Legislature alone can create municipalities properly so called; establish their functionaries, and assign them their proper duties and their powers—but always within the limits of its own. Whether or not it can render them incapable of other duties and powers, to be delegated by Parliament, is a question that need not here be considered. Our Legislature, as will presently be seen, has been careful (by article 449 of the Municipal Code) to declare them not so. And as to all powers, not of Provincial competency, so to speak, which they may hold under antecedent delegation of the unlimited Legislature of the late Province of Canada, these can be resumed or altered by Parliament alone. As being exercised by municipalities they may be styled in a certain sense municipal. But such sense is not that of the Union Act; nor even as mere matter of presumption *prima facie* is it that of Provincial legislation under authority of the Union Act.

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[The learned judge, after examining the question whether the Quebec License Act (34 Vict. c. 2) or the Municipal Code (34 Vict. c. 7) shewed any intention to repeal the Temperance Act of 1864 as to any provision material to the case before him, and concluding that there was clearly no such intention, proceeded as follows (p. 189):—]

But were it even as clear that the Legislature meant to repeal these sections [those which provide for the passing of Temperance Act by-laws] wholly or in part, as in truth it is clear that they did not—there would remain the question of their constitutional right to do so. Is the answer any less clear as to this?

It was ably and earnestly urged at the argument that the course taken in the Legislature of the late Province of Canada, when dealing with the Bill (now the Temperance Act) shews that it was not then regarded by the House as a Bill relating to trade. There is no doubt that in 1855, on occasion of the third reading of a bill then before the House "to prevent the traffic in alcoholic and intoxicating liquors," objection was taken that as relating to trade it ought to have originated in Committee of the Whole. The Journals (30th April, 1855,) shew that thereupon "Mr. Speaker stated that by the 51st Rule of the House in all unprovided cases, the rule of the Parliament of Great Britain should be followed, and the standing order of the Commons of England, of 1772, declared that bills relating to trade be not brought into the House, until the proposition should first have been considered in Committee of the Whole House; and as his duty was to declare what the rule was, he declared that the Bill before the House, regulating the sale of all intoxicating liquors, was a bill relating to trade, and altering the laws relating to the trade, and came within the meaning of the standing order; and he further

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stated that the practice in the House of Commons had not been uniform, but that when the objection had been taken the rule had always been enforced." On appeal from this ruling it was sustained by a vote of 59 to 46; and the bill was dropped. It is further certain from the Journals, that the bill (now the Temperance Act) did not originate in Committee of the Whole; and that no objection to it on that ground was taken, at any time during its course through the House. It is a fair inference that being a measure of merely local and possibly temporary application, and in fact of a municipal character—in the sense then universally given to that term—it was not regarded as a measure relating to trade, within the sense of the rule in question. But it is not that sense that is here in issue. We are dealing here, not with an elastic rule of a parliamentary body adopted from considerations of convenience, and relaxed by it in practice whenever it may please—but with the iron rule of a Constitutional Act, from the true intent and meaning of which neither Parliament, nor Legislature, nor Court of Law can in the least derogate. If the Temperance Act, in respect of its purely prohibitive by-laws, their enactment, effect and enforcement, is not—within the sense of this latter rule—a measure for "regulation of trade and commerce," what is it? Passed by a Legislature having power to that end, it goes to prohibit—locally, no doubt, and conditionally, perhaps even temporarily, but still to prohibit—a specified branch of trade; defining precisely the prohibition, and providing for giving it effect. Prohibition is an incident of regulation; can be enacted only by a body having power to regulate. A law regulative of trade, like any other, may be of local, temporary and conditional application; and may be in form a delegation of the power to regulate, to a body or officer therewith

charged. Within the sense of the 92nd section of the Union Act, these provisions of the Temperance Act, and the by-laws passed under them, are neither municipal, nor matter of mere property and civil rights in the Province, nor matter of merely local or private nature in the Province. The 91st section of the Union Act reserves them to all intents—reserves, indeed, for that matter, with them the analogous liquor-trade clauses of the Consolidated Municipal Act, as amended in 1866 (which the Legislature no doubt did mean to repeal), in so far, that is to say, as these deal with prohibition or other regulation of the liquor trade, apart from issue of revenue licenses—for the sole legislative control of the Parliament of the Dominion. (1)

(1) [It appears from City of Fredericton *v.* The Queen (*ante*, at p. 51), that this case was reversed by the Quebec Court of Queen's Bench, but that the judgment of the Queen's Bench was by consent reversed in the Supreme Court. See as to the ground of the reversal in the Court of Queen's Bench, Corporation of Three Rivers *v.* Sulte, *ante*, at p. 286.]

QUEBEC CIRCUIT COURT.

1882
March 13.

DE ST. AUBYN, ESQUALITÉ, *v.* LAFRANCE.

[*Reported 8 Quebec Law Rep. 190.*]

Intoxicating liquors, power to prohibit sale of—Trade and commerce.

Provincial Legislatures can make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils. (1)

[*Translated.*]

ALLEYN, J.:—

The plaintiff, as inspector of licenses, sues the defendant for having sold spirituous liquors by retail without a license, and in violation of the Quebec License Act, 1878.

The defendant has pleaded that the municipal council of St. Cécile of Bic had by by-law prohibited the sale of spirituous liquors, and that in consequence he had not been able to obtain a license to sell by retail from the inspector of licenses, inasmuch as the latter being bound to comply with the by-law passed by the said council, was obliged to refuse all licenses; that, moreover, the Legislature of Quebec had only the right to impose a tax for the purpose of Provincial expenditure, but could not regulate or restrain commerce, and consequently, could not give to municipal councils the right to prohibit the sale of liquors, and that the Government could not benefit by the fine in this case, since it was by

(1) [But see Corporation of Three Rivers *v.* Sulte, *ante*, p. 280.]

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Alleyn, J.

its acts that it had been made impossible for the defendant to obtain a license.

Thus the contention of the defendant is that the by-law passed by the municipal council of St. Cécile of Bic is illegal, and that he, the defendant, ought not to be fined, seeing that it was impossible for him to obtain a license.

The by-law in question was passed in conformity with article 561 of the municipal code. This code was the creation of an Act of the Provincial Legislature, and it is evident that that Legislature could not confer on municipal councils powers which it did not itself possess. Had the Provincial Legislature power to prohibit the sale of liquors? Sections 91 and 92 of the B. N. A. Act declare what are the powers of the Federal Government and of the Provincial Legislatures. Section 91, sub-sect. 2, says that the Federal Parliament has the right to legislate on all questions relating to trade and commerce, and section 92, sub-sect. 9, gives to the Provincial Legislatures the right to pass laws in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." And it is by virtue of this sub-section alone that the Provincial Legislature could claim the right to pass laws affecting or restraining commerce. It is, however, evident that according to the express terms of the B. N. A. Act, all questions concerning trade and commerce are within the exclusive jurisdiction of the Federal Parliament, whilst the Provincial Legislatures possess the right of raising a revenue, by means of licenses granted for the object mentioned in the said sub-section. To these Legislatures belongs the right to pass laws for the regulation of the sale of liquors, taverns, etc., as well as the sale of drink in public places, with the object of maintaining order. Such laws have nothing to do with trade and commerce, and would be made

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with a view to the preservation of peace and good order. But if the Provincial Legislature goes further, and passes any Act, the effect of which would be either directly or indirectly to prohibit the manufacture or sale, or to restrict the use of any article of trade or commerce, whether it be spirituous liquors or other articles of merchandise, so as to hinder or restrict the sale and trade of such articles, then the Legislature encroaches on the powers of the Federal Parliament, and acts illegally.

What have we in this case? A by-law passed by a municipal council, which prohibits the sale of spirituous liquors by retail. The Legislature itself has not the right to prohibit or restrict the sale of any article of commerce. How, then, could it have the right to delegate to a municipal council the power to do so? The by-law in question is then illegal, the municipal council not having the right to restrict commerce in any manner.

It is necessary now to consider the position of the defendant. He is prosecuted under section 71 of the Quebec License Act of 1878, for having sold whiskey without the license required by the statute, and he admits having sold at different times whiskey and gin without a license. The license law aims at raising a revenue by means of licenses, and preventing the sale of liquors without a license. Section 2 forbids any one, under pain of a fine, from selling intoxicating liquors without a license, within the limits of this Province, and section 71 imposes a fine of $75 on every person who shall sell intoxicating liquors without a license, in any organized municipality, such as St. Cécile of Bic. Here, then, is a law which seems to reach the defendant, since he admits that he has often sold, without a license, intoxicating liquors, at Bic, but he wishes to justify himself, and asserts that he does not come within the scope of this law, because, he says, the municipal council of

St. Cécile of Bic having passed an unlawful by-law, prohibiting the sale of drink by retail, it has been impossible for him to obtain a license, the inspector of licenses not being able to grant him one in view of this prohibition. This is quite true to a certain extent. It is quite true that the by-law is illegal, and it is also true that in view of the prohibition involved in this by-law, the inspector would not have granted a license to the defendant. But the illegal act of the municipal council of St. Cècile of Bic cannot justify the conduct of the defendant in selling without a license contrary to the terms of the law. He should have taken proceedings against the municipal council and the inspector before commencing the business of selling liquors without a license; he should have tendered the price of his license, and on a refusal to accept it, and consequently being unable to obtain a license, he would have been right in answering this action of the inspector as he has done. Not having thus acted, and having sold intoxicating liquors without a license, the defendant must be sentenced to pay the fine (1).

F. F. Rouleau for plaintiff.

Pouliot & Bernier for defendant.

(1) [See Keefe v. McLennan, *post*, p. 400.]

SESSIONS OF THE PEACE, QUEBEC.

1882

November.

HOLMES *v.* TEMPLE.

[*Reported 8 Quebec Law Rep. 351.*]

Military and naval service—B. N. A. Act, s. 91, sub-s. 7—44 and 45 Vict. c. 58, s. 153, Imp.

The Parliament of Canada has under the B. N. A. Act exclusive jurisdiction in matters relating to militia, military, and naval service and defence, and, consequently, the provisions of the Imperial Army Act of 1881 do not apply to Canada, so as to make persons not connected with the Active Militia of the Dominion liable in respect of acts which are offences under the Imperial Act, but not under the Militia Act of Canada.

Mr. *Dunbar*, Q.C., for Major Holmes, prosecutor.

Mr. *Hearn*, Q.C., for Captain Temple, of the British vessel "Genii."

CHAUVEAU, J.:—

This is a prosecution directed by Major Holmes, temporarily in command of "A" Battery, Royal School of Gunnery, against Robert Temple, master of the British vessel called the "Genii," now in the port of Quebec, for having on the 3rd inst., at the harbour of Quebec, unlawfully attempted to persuade one Bernard O'Neil, then and there being a duly enlisted soldier, to wit, a gunner in the "A" Battery, Royal School of Gunnery, Active Militia of Canada, and whose term of service had not then expired, to desert from the said "A" Battery, Royal School of Gunnery, he, the said Robert Temple, well knowing the said Bernard O'Neil to be such enlisted soldier aforesaid, against the form of the statute in such case made and provided.

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Chauveau, J.

The counsel for the complainant has admitted that the prosecution is brought under the 153rd section of the Imperial Army Act, 1881.

The defendant, by his counsel, has raised the question of my jurisdiction in the matter, and contends that the Army Act of 1881 (Imperial) is not binding, and has no application in Canada, in so far as third parties are concerned. He also claims that under section 91 of the B. N. A. Act, 1867, the Canadian Parliament has the exclusive legislative authority in all matters of militia, military, and naval service and defence. The defendant asserts that, acting under the authority and powers conferred upon it by the B. N. A. Act, the Canadian Parliament has enacted and passed a law or statute respecting the militia and defence of the Dominion of Canada, 31 Vict. c. 40. That the "A" Battery and School of Gunnery are the offspring of that statute, which creates no offence of the nature of the one imputed to defendant, and that the English Army Act cannot be invoked against him. The defendant goes further, and asserts that the men enlisted in "A" Battery are not soldiers, and that even if they were, the defendant could not be tried under the English Army Act, because we have a Canadian statute passed in 1869 which provides for cases of this description. It is also urged on the part of the defence that Major Holmes had no authority to bring this complaint, and that his authority did not appear upon the face of the proceedings.

It will be thus seen that the question I am called upon to determine is one of the gravest importance, not only to the prosecution, but to the captain of the "Genii." It involves the question whether since confederation England can legislate for Canada in matters affecting the militia and defence of Canada, viz., whether any law passed by the Imperial Parliament respecting these

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matters can affect civilians or third parties. It is the first time the question has been raised since confederation, and I have, therefore, given to the subject my best and most serious consideration. I have ascertained that there is no record at Ottawa of the point ever having been mooted, and I am, therefore, left to my own resources to decide the question.

As to the point raised whether Major Holmes had authority to bring the complaint in his own name, or whether the Adjutant-General should have done so, the article cited by the defence from the regulations and orders for the militia, Canada, does not apply, and I am against the defence on that ground. I am also against the defence upon the argument that it does not appear that "A" Battery is in actual existence; that might be a point at the trial on the merits, but not as to jurisdiction. We all know that "A" Battery exists. The citizens are well aware that the officers and men of "A" Battery have rendered most willingly and very efficiently important services in quelling riots, and otherwise placing themselves at our disposal when called out, and, however much I may regret the judgment I am about to render, I must determine the important question submitted by the defence and decide according to law. Now, I consider that the other two sections, 176 and 177 of the Army Act, referred to by the counsel for the prosecution, do not sustain his pretensions; on the contrary they assist the view I take.

The Army Act of 1881 applies to the officers and men of "A" Battery as between themselves, by section 64 of the Militia Act, but not to outsiders. The 91st section of the B. N. A. Act, 1867, is express and positive as to the powers of the Canadian Parliament. It is thereby declared that the exclusive legislative authority of the Parliament of Canada extends to all matters coming

within the classes of subjects therein enumerated, and No. 7 of the subjects is "militia, military, and naval service and defence."

This Act was passed in 1867. The Dominion Parliament enacted a law respecting the militia and defence of the Dominion of Canada in 1868. This statute, strange to say, creates no offence for persuading or attempting to persuade men enlisted under it to desert. As this statute is our law, and as it creates no offence, the judge cannot go beyond it and have recourse to the Army Act of 1881.

Besides the statute of 1868, the Dominion Parliament passed a law in 1869, 32-33 Vict. c. 25, an Act respecting certain offences relative to Her Majesty's Army and Navy. Section 1 of this Act provides the mode of procedure, and prescribes the penalty for enticing soldiers or sailors in Her Majesty's service to desert. The penalty is not less than $80, and no more than $200. In the prosecution as brought, I have no discretion to exercise; if I had jurisdiction, and the defendant proved guilty, I would be bound to sentence him to imprisonment for a period not exceeding six months.

Without pronouncing upon the fact whether the men enlisted in "A" Battery are or are not soldiers, I am of opinion that if they were soldiers (an enlisted soldier in Her Majesty's service, or a seaman in Her Majesty's naval service), the prosecution should have been brought under our own statute, 32-33 Vict. c. 25, and not under section 153 of the Army Act, 1881; that the latter Act has no force in Canada with respect to citizens or persons not connected with "A" Battery; that the Canadian Parliament has exclusive authority in matters of militia, military, and naval service and defence; that the Militia Act, 31 Vict. c. 40, creates no offence for attempting to persuade men enlisted in "A" Battery to desert, and that the plea of jurisdiction has been properly raised, and I maintain it.

NOVA SCOTIA SUPREME COURT.

1876
Dec. 12.

KEEFE *v.* MCLENNAN.

[*Reported 2 Russell & Chesley, 5.*]

Intoxicating liquors, power to regulate sale of—Trade and commerce.

A Statute of Nova Scotia, passed after Confederation, imposed penalties for retailing intoxicating liquors without a license, and provided that licenses should only be granted upon the recommendation of the Grand Jury, concurred in by two-thirds of the members present, and accompanied by a petition for the license from two-thirds of the ratepayers of the polling district in which the tavern was to be established. Enactments not essentially different were in force in the Province before Confederation:

Held, That the Act in question was not *ultra vires* of the Legislature.

Held, further, that if the restrictions were *ultra vires* the proper course was to apply for a mandamus to compel the granting of a license, and that a refusal to grant licenses did not justify selling without a license or relieve from the statutory penalty thereby incurred.

A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby.

The defendant was prosecuted under the provisions of cap. 75, Revised Statutes (4th series), for retailing intoxicating liquors without license, and judgment was obtained against him for the amount of the penalty. A rule *nisi* to set the judgment aside was granted in the following terms:—

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STATEMENT.

"On motion it is ordered that the judgment given in this cause be set aside on the following grounds, viz.: That the legislation of the Local Assembly of Nova Scotia, regulating the sale of intoxicating liquors, as per chapter 75 of the Revised Statutes, fourth series (1), and the refusal of the General Sessions of the Peace for the County of Cape Breton, last convened, to grant licenses for the sale of intoxicating liquors in said county is contrary to law, and the provisions of the B. N. A. Act of 1867, unless cause to the contrary be shewn within the first four days of the ensuing term of the Supreme Court at Halifax."

Mr. *Graham* in support of the rule.

The sections of the Provincial Statutes on which the Sessions refused to grant licenses are Acts of 1869, c. 2, and R. S., 4th series, c. 75, p. 343. The sections in the Revised Statutes are slightly different from those in the Act of 1869. Section 3 of the Act of 1869 imposed different penalties. Section 4 provides the mode in which licenses are to be granted, the same as in the Revised Statutes now, but not the same as previously existed. Section 12 of the Act of 1869 repealed all previous provisions of the Revised Statutes where inconsistent. The Sessions were bound to grant licenses. Chapter 75 of

(1) Revised Statutes, 4th series, c. 75, s. 2: "No intoxicating liquors shall be sold in quantities less than ten gallons, to be delivered at one and the same time, unless in the original package in which imported, such original package not to mean bottled liquors in quantities less than ten gallons, or by license, under the penalties set forth in section 6 of this chapter."

Section 3: "Licenses for the sale of intoxicating liquors shall only be granted by the Sessions upon the recommendation of the Grand Jury, concurred in by two-thirds of the members of the Grand Jury, present, accompanied by a petition from two-thirds of the ratepayers of the polling district in which the tavern is intended to be established, praying for such license. The genuineness of the signatures of such petitioners shall be established to the satisfaction of the Court, and such petition and recommendation from the Grand Jury may be rejected in whole or in part by the Sessions."

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the Revised Statutes was a re-enactment, and as such would be unconstitutional; but it is not necessary to contend that, as the original enactment was in 1869. The clauses of the Union Act bearing upon the point are section 91, sub-sections 2 and 3. The exclusive legislation of the Dominion Parliament includes the regulation of trade and commerce and the raising of money by all methods of taxation. The powers of the Local Legislatures are granted to them strictly, and everything that is not expressly granted to them is reserved to the Dominion Parliament. (See judgment of Ritchie, C. J., of N. B., in *R.* v. *Justices of King's County* (1); 9 Wheaton, 229, as to definitions of "Commerce," Id. 196. The definitions are cited in *Queen* v. *Taylor* (2).

The sale of liquor is a branch of trade and commerce. The Legislature in passing this Act, requiring two-thirds of the ratepayers to petition, virtually prohibits the sale of liquor—*R.* v. *Justices of King's County*—where a statute less prohibitory than the Nova Scotia statute was held to be unconstitutional. This view was concurred in by Strong, J., now a Judge of the Supreme Court of Canada. The only taxing power given to the Local Legislature is to levy a direct tax.

Mr. *Rigby*, Q. C., contra.

The question under one branch of the rule is whether the Sessions can refuse to grant licenses or not. We must assume that the Sessions looked at the law before granting or refusing licenses. We are not discussing whether the Sessions acted per force of a petition under the Act, but have they an inherent right to refuse? The legislation previous to confederation gives them the right, even if subsequent enactments are unconstitutional. Section 129 B. N. A. Act continues in force all

(1) 2 Pugsley, 525; *post.* (2) 36 U. C. Q. B. 183.

existing laws in the several Provinces, except as otherwise provided in the Act. Revised Statutes, 3rd series, p. 61, gave the Sessions power to refuse licenses in certain cases, and compelled them to do so in any polling section where a majority petitioned against it. The Act of 1869 only modified that provision by making a two-thirds petition necessary for a license.

The right to regulate shop, saloon, and tavern licenses to raise a revenue for provincial, local, or municipal purposes is given to the Local Legislatures. (Wilkins, J.: Sect. 129 of the B. N. A. Act provides that all existing provincial laws shall continue in force unless otherwise provided by the B. N. A. Act. This case is otherwise provided for, as the Union Act gives the Dominion Parliament exclusive control of the subject of trade and commerce.) The case is the same as that of bankruptcy and interest. The provincial laws on those subjects remained in force until Dominion legislation took place, although those subjects were given exclusively to the Dominion Parliament. The subject of divorce is in the same plight. The Provincial Divorce Court is acting now under a Provincial statute. Suppose the Provincial Legislature were to repeal the Divorce Acts, would the present Divorce Judge take any notice of the repeal? (Ritchie, E. J.: I would not be governed by any legislation of the Local Legislature repealing or changing the existing divorce laws, as the Local Legislature has no present right to legislate on the subject.) The reservation in sect. 129 of the B. N. A. Act applies to cases where the B. N. A. Act expressly modifies existing provincial law.

(The Court: It is a question whether the enactments of the Revised Statutes, third series, on which you rely are not repealed by the subsequent statute.) The subsequent legislation, if *ultra vires*, cannot have any effect

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at all on the previous law. (Ritchie, E. J.: It is not contended that the subject matter of the law in Revised Statutes, 3rd series, is *ultra vires*, but only certain clauses in the statute.) In so far as the repealing statute refers to those *ultra vires* clauses it is inoperative, and they remain law under sect. 129 of the B. N. A Act.

(*Weatherbe*: The question does not turn upon the Revised Statutes, 3rd series. The rule is taken out with reference to the Revised Statutes, 4th series, which is a fresh enactment, and therefore, as we contend, unquestionably *ultra vires.*)

Graham in reply.

It is understood now that the rule is to be argued with a view to the statutes passed since the Union. Although the Local Legislature has power over shop and tavern licenses, etc., that power is given only for the raising of a revenue. The license enactments are passed with a view of prohibiting the trade.

The judgment of the Court was delivered by

RITCHIE, E. J.:—

The defendant was prosecuted for selling intoxicating liquors in small quantities without license, and judgment was obtained against him for the penalty, when, on motion of his counsel, a rule was granted to shew cause why the judgment should not be set aside on the ground that the legislation of the Provincial Parliament regulating the sale of intoxicating liquors, and the refusal of the General Sessions of the Peace for the County of Cape Breton to grant licenses for the sale of intoxicating liquors in that county is illegal and contrary to the provisions of the B. N. A. Act of 1867.

At the argument, the defendant's counsel relied on that portion of the B. N. A. Act which conferred on the Dominion Parliament the exclusive right to legislate on the regulation of trade and commerce, of which he contended the legislation in question was a violation.

By the 2nd sect. of c. 75 of the Revised Statutes of Nova Scotia it is enacted that no intoxicating liquors shall be sold in quantities less than ten gallons, to be delivered at one and the same time, unless in the original package in which imported, such original package not to mean bottled liquors in quantities less than ten gallons, or by license, under the penalties set forth in the Act.

By the 9th section the Court of Sessions in the various counties are authorized to fix the amount of duty to be paid for the license, and by the 3rd section it is provided that licenses shall only be granted by the Sessions upon the recommendation of the Grand Jury, concurred in by two-thirds of its members present, accompanied by a petition from two-thirds of the rate-payers of the polling district in which the tavern is intended to be established, praying for such license, which petition and recommendation from the Grand Jury may be rejected in whole or in part by the Court of Sessions.

Enactments differing in no essential respect from the foregoing were in force in this Province at the time of the passing of the B. N. A. Act, and remained so under the 129th section of it, which provided that all laws in force in the several Provinces should continue so notwithstanding the Union, subject, nevertheless, to be repealed or altered by the Parliament of Canada or by the Legislature of the respective Provinces according to the authority of the Parliament or of that Legislature under that Act.

The Parliament of Canada has neither repealed nor

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altered the provincial enactments on this subject, nor passed any law inconsistent with them, and our Local Legislature, in revising and consolidating the statutes of the Province, has introduced these provisions, or provisions of a like character, into the consolidated statutes passed in the year 1873, and the 4th section of the Act to provide for the publication of the consolidated statutes enacted that the Acts then in force should continue until the publication of the consolidated statutes by proclamation, after which they should be repealed and cease to have any force and effect.

It cannot reasonably be contended that the defendant was not liable to a penalty for selling intoxicating liquors in small quantities without a license because the Provincial Legislature had no right to impose such penalty, when among the subjects over which the Provincial Legislature is given the exclusive power of legislation by the B. N. A. Act are shop, saloon, tavern, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes, and the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated as within the powers of the Local Legislature. What the defendant's counsel relied on was that the Local Legislature had exceeded its powers in so legislating as that the Court of Sessions of a county could refuse to grant or be prevented from granting licenses within the county or any particular portions of it.

Assuming that the Local Legislature had a right to require licenses to be taken out for the sale of intoxicating liquors in small quantities, and to impose a penalty on those who sold without license, but had exceeded its powers in authorizing the Court of Sessions in any event

to refuse the granting of licenses throughout the county or in certain districts, it by no means follows that though in the latter case the enactments might be void as *ultra vires*, those enactments which are strictly within its powers are to be held inoperative and void; by these the selling of intoxicating liquors without license is made illegal and the seller made liable to a penalty. The defendant is in that position, and it is no defence for him to shew that the Local Legislature had no power to refuse the granting of licenses. If that were the case, and the Court of Sessions had no right to refuse licenses, as contended for, then the proper course would have been to apply to this Court for a *mandamus* to compel the granting of them; but such refusal would not in my opinion sanction or justify all persons selling without license, in violation of that legislation which is within the power of the Local Legislature.

If that Legislature had no right to enact in the last series of the Revised Statutes the provisions which it is contended are *ultra vires*, then it had no power to repeal the provisions of a like character which were in force at the time of the passing of the B. N. A. Act, for the power to repeal, as the power to enact, depends upon whether the subject matter is within the legislative powers of the Dominion or Local Parliaments. On these grounds alone I think the conviction should be sustained; but as the argument addressed to us referred mainly to the question whether the Local Legislature had exceeded its powers in legislating as it has done, it may be proper to express an opinion on that point.

It will be borne in mind that the enactment is not one whereby *all trade* in intoxicating liquor is or can be wholly prevented. The sole object of the Legislature was unquestionably the promotion of temperance, and the protection of the health and morals of the people,

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and the preservation of the peace and good order of the community, matters of police, which but for the clause in the B. N. A. Act, conferring on the Dominion Parliament the right to regulate trade and commerce, would have undoubtedly been within the scope of local legislation.

The section of the B. N. A. Act which confers legislative powers on the Parliament of Canada, restricts such powers to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces. The terms "Property and civil rights," the power of dealing with which is vested in the Provincial Parliament, are very comprehensive; and on referring to the 94th and 97th sections it is evident that the framers of the Act did not intend that they should receive a very restricted interpretation; and yet in the most restricted sense they embrace the subjects I have referred to, for life, health and personal safety are the rights of the people of every free country; to preserve them is the duty of the Legislature; and any laws which have for their object the prevention of intemperance directly affect these subjects; for not only does drunkenness destroy the health and reputation, waste the property, and ruin the happiness and comfort of those addicted to it, but it is the cause of most of the crimes committed in the land. It is not, therefore, to be wondered at that the Local Legislature should desire to pass such laws as would be likely to lesson an evil fraught with such consequences to the community; and if it cannot do this because it indirectly and to a limited extent affects one of the subjects over which the Dominion Parliament has power of legislation, it must equally, and for the same reasons, be restrained from making any regulations to protect the community from the evils arising from the sale of unwholesome provisions or the unrestricted sale of poisons, which, it appears to me, it can hardly be con-

tended it has not the power of making; and yet, whatever evils may arise from these sources, they are cast in the shade by those which arise from the excessive use of intoxicating liquors, and even those enactments of our Legislature which prohibit the sale of intoxicating liquors to minors and persons adjudged to be habitual drunkards, and sales made on a Sunday, as this all affects trade, must be illegal unless deemed otherwise as police regulations. I cannot but view these and the enactment in question as such, and the Provincial Parliament is, in my opinion, entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with that object alone, even though to a certain limited extent it should affect trade and commerce.

In addition to what I have already said, I may remark that we are to assume that the framers of the B. N. A. Act knew of the legislation which was in force in the several Provinces, and, at the time of its passing, the law in this Province relating to the granting of licenses for the sale of intoxicating liquors recognised the right of the Court of Sessions to refuse licenses for the sale of them in small quantities within their respective counties, and that Act did not repeal the Provincial law then in force, so that when the right of granting licenses was conferred on the Provincial Legislature it may very reasonably be presumed that the intention was that the right should continue to be exercised in the same manner as it was then exercised.

Authorities bearing directly on the question under consideration are not to be met with in the English Reports, but there are several decisions of the United

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States Courts which bear a strong analogy to it, and those which most closely resemble it are what are termed "The License Cases" (1).

The power regulating commerce is by the constitution of the United States vested in Congress, and this power is *general and unlimited.* See *Story on the Constitution*, sect. 1066 and 1067. The ground taken in these cases was that the power, though exclusive, did not prevent the State Legislature from passing laws restricting the sale of spirituous liquors, considering them as police regulations rather than regulations of commerce. The Chief Justice, in giving judgment in one of them, said, "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper." And McLean, Justice, said, "In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease must mainly depend upon the evil to be remedied. Under the pretence of a police regulation a State cannot counteract the commercial power of Congress. And yet, as has been shewn, to guard the health, morals and safety of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial

(1) 5 Howard, 504, 577, 592.

law is limited to the existing exigency. Still it is clear that a law of a State is not rendered unconstitutional by an incidental reduction of importation. And especially is this not the case when the State regulation has a salutary tendency on society and is founded on the highest moral considerations."

And again, "If the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients fatal to the health of those who use it, its sale may be prohibited." And Grier, Justice, referring to the public peace, health and morals, said, "As subjects of legislation they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance which relate only to property, convenience or luxury, to recede when they come in conflict or collision, *salus populi suprema lex.*'"

Though the decisions in these cases are not binding upon us, the opinions of the judges of a court of so high a character as that of the Supreme Court of the United States are entitled to the greatest respect, and the reasoning on which their decisions are founded commends itself very much to my judgment, and is, it appears to me, as applicable to the case before us as it was to those under their consideration; and, in my opinion, the conviction here should be confirmed, and the rule to set it aside discharged.

NOVA SCOTIA SUPREME COURT.

1876
Dec. 12.

KINNEY *v.* DUDMAN.

[*Reported 2 Russell & Chesley, 19.*]

Insolvency—Civil Rights—32-33 Vict. c. 16, s, 59, D.

Section 59 of the Dominion Insolvent Act of 1869 (1) provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if before the payment over to the plaintiff of the moneys levied the estate of the debtor had been assigned or placed in liquidation under that Act:

Held, to be within the competence of the Dominion Parliament.

This action was brought by the plaintiff, being the assignee of John T. Hutchinson, an insolvent, whose estate had been put in compulsory liquidation by a writ of attachment issued on the 15th of September, 1874.

The plaintiff set out in his writ that the defendant, the sheriff of the county of Yarmouth, had levied upon certain property belonging to the insolvent, under executions against him issued previously to the writ of attach-

(1) 32-33 Vict. c. 16, s. 59 (Insolvent Act of 1869): "No lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, if before the payment over to the plaintiff of the moneys actually levied under such writ the estate of the debtor shall have been assigned to an interim assignee, or shall have been placed in compulsory liquidation under this Act; but this provision shall not affect any lien or privilege acquired before the passing of this Act, or any privilege for costs which the plaintiff possesses under the law of the Province in which such writ shall have issued by reason of such issue, delivery, levy, or seizure."

ment; but, that although such levy was made previously to the issue of the attachment, the goods were not sold until afterwards, and that on the 17th of September, the defendant having notice of the issue of the attachment, proceeded to sell and did sell the goods and paid over the proceeds to the execution creditors. There were also other pleadings, a statement of which is not necessary for the purposes of this report. A verdict having been found for the plaintiff, a rule *nisi* was afterwards obtained to set this verdict aside.

Mr. *Bingay* (Mr. *Weatherbe* with him), in support of the rule, contended that section 59 of the Insolvent Act was *ultra vires*, civil rights, etc., being under the exclusive control of the Local Legislature.

Mr. *Pelton* (Mr. *Meagher* with him), contra.

The B. N. A. Act, sec. 91, sub-sec. 21, gives the Dominion Legislature exclusive jurisdiction in matters of insolvency and bankruptcy. The objection, if good, destroys the whole Insolvent Act. The reservation to the Local Legislature of "Property and Civil Rights" must be read as subordinate to "Bankruptcy and Insolvency," assigned to the Dominion Legislature. The same objection would apply, if valid, to Dominion legislation on bills of exchange. The closing paragraph of sec. 91 further enacts that any matter coming within any of the classes of subjects enumerated in the section, shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of subjects reserved to the Local Legislature.

Weatherbe, in reply.

Section 59 of the Act, we say, is *ultra vires*, or a portion of it. Wherever the provisions of the Insolvent Act conflict with the provisions of our own statutes in regard

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to matters over which the Local Legislatures have exclusive jurisdiction, then the Act is *ultra vires*.

The preamble of the Insolvent Act points to the expediency of amending and consolidating the laws relating to insolvency in the several Provinces. The Act is of the character referred to in sec. 94 of the B. N. A. Act, being legislation for the uniformity of the laws of the Provinces. Under the last mentioned section the Act should have been re-enacted in the Province to be affected by it.

It is true that sub-sec. 21 of sec. 91 gives the Dominion Legislature exclusive jurisdiction over the subjects of bankruptcy and insolvency. Under that section it is quite possible and within the power of the Dominion Legislature to pass an insolvency law which will not interfere with the laws and rights created by Provincial statutes in respect to subjects over which the Provincial Legislatures have exclusive jurisdiction. But the Insolvent Act of 1869 is not such an Act.

The judgment of the Court was delivered by

RITCHIE, E. J. :—

The defendant, the sheriff of Yarmouth, is sued in this action by Kinney, the assignee of John T. Hutchinson, an insolvent. A writ of attachment was taken out against Hutchinson on the 15th September, 1874, which was placed in the hands of the defendant with directions to attach under it all the estate of the insolvent, including goods which he had already levied on under certain executions against Hutchinson, which had previously been placed in his hands. Though a levy had been made on the goods, they were then unsold. On the 17th September the defendant proceeded to sell all the goods, and did sell them, as the plaintiff alleges, in an improper manner,

and without due advertisement whereby they produced much less than they would have done if properly sold, and paid over the proceeds to the judgment creditors. It was contended he had a right to give the proceeds of the sale to the execution creditors as being entitled to them. Certainly that is not the case if any efficacy is to be given to the Insolvent Act of 1869. Its terms are so clear and explicit as to leave no room for argument.

The 59th section applies to just such a case, and declares that a creditor shall acquire no lien or privilege upon either the real or personal estate of the insolvent for the amount of any judgment debt by the issue or delivery to the sheriff of any writ of execution, or by levying the same or seizing thereunder the effects or estate of the insolvent, if, before the payment over to the plaintiff of the moneys levied, the estate of the debtor shall have been assigned or placed in compulsory liquidation under the Act, and the defendant's counsel were forced to the contention that the passage of the Act by the Dominion Legislature was *ultra vires*, and that it had no power to render inoperative the previously existing Provincial legislation, giving to a creditor a lien on his debtor's property by the levy of his execution on it. But surely there is nothing to sustain such a contention.

An Insolvent Act must necessarily conflict with previously existing legal rights, and insolvency is a subject over which the Dominion Parliament has the exclusive power of legislation, so that a Dominion statute in relation to insolvency overrides all Provincial enactments.

[The remainder of the judgment is omitted, the same having no reference to the constitutional question.]

NOVA SCOTIA SUPREME COURT.

1881

Feb. 16; April 5.

JOHNSTON *v.* POYNTZ.

[*Reported 2 Russell & Geldert, 193.*]

Debtor power to provide for discharge of—41 Vict. c. 8, N. S.

By an Act in force in the Province of Nova Scotia at the Union every debtor imprisoned under process from any Court was entitled to apply for and obtain his discharge. When this Act was passed there were no County Courts in Nova Scotia. In 1878 an Act of the Provincial Legislature was passed, making the above provisions applicable to persons imprisoned under process from the County Courts, and this enactment was held to be valid.

This cause was argued February 16th, 1881, before Ritchie, E. J., Des Barres, McDonald and James, JJ. It was an action against two commissioners for discharging a debtor arrested under process issued out of the County Court. The cause was tried previous to the passage of chapter 8 of the Acts of 1878, without a jury, before the Judge of the County Court sitting at Windsor, but judgment was not given until December, 1878, when it was pronounced in favour of plaintiff, and a rule was granted to set it aside. The Act for the relief of debtors imprisoned under process out of the County Court was passed April 4th, 1878, one clause of which provided that no action in any Court should be taken or sustained by reason of proceedings theretofore taken for relief of said debtors, being illegal, invalid or void.

Mr. *Rigby*, Q.C., in support of appeal.

On the 4th of April, after the trial and before judgment, chapter 8, Acts of 1878, was passed. The sixth

section is expressly retrospective and covers this case. It provides that where debtors have been imprisoned and released since the passage of the County Court Act, such release shall be valid, and further that no action shall be commenced or sustained. It may be argued that the Act is *ultra vires* as relating to insolvency, but it has no relation to the general subject of insolvency. It concerns property and civil rights.

Mr. *J. J. Ritchie*, contra.

The jurisdiction of the Commissioners, if any, is derived from statutes passed since confederation, which I contend are *ultra vires*. The subjects of bankruptcy and insolvency are exclusively within the jurisdiction of the Dominion Legislature under sect. 91 of the B. N. A. Act, *R.* v. *Chandler* (1). In that case an Act providing for the examination of a debtor before a judge was held to be *ultra vires* of the Local Legislature as dealing with the subject of insolvency. That is what our Act does; and if so, then it comes within the spirit of that decision. The Legislature when passing the fourth series of the Revised Statutes placed the Act for the relief of insolvent debtors in the appendix, shewing that they were aware that they had no legislative power.

Rigby, Q.C., in reply.

The Local Legislature has jurisdiction over matters relating to property and civil rights. To discharge a person unable to pay a particular debt is not to deal with the general subject of insolvency. The object of the Act was to protect the Commissioners from suits in our Courts. There can be no doubt that the Local Legislature has power to pass an Act controlling procedure in our own Courts, by providing that no action

(1) 1 Hannay, 556; *post*, p. 421.

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shall be brought in our Courts against persons who have acted as Commissioners believing themselves to be such. The Local Legislature has exclusive jurisdiction in procedure in civil matters. (Ritchie, E. J.: Is not this more than regulating procedure? It affects the Insolvency Act.)

The judgment of the Court was delivered by

RITCHIE, E.J.:—

The two defendants were Commissioners for giving relief to insolvent debtors, and, as such, made an order for the discharge of one John McLeod, who was in custody under an execution at the suit of the plaintiff on a judgment entered in the County Court. By chapter 137 of the Revised Statutes (3rd series) the Governor in Council was authorized to appoint Commissioners for the relief of insolvent debtors, but by the subsequent section provision is only made in terms for application by persons imprisoned under process issuing out of the Supreme Court, the County Courts not being then in existence. Since these Courts were established no Act had passed in relation to persons imprisoned under them, and the Act establishing them is silent on the subject.

This suit was tried in February, 1878, but no judgment was then given, and on the 4th of April following an Act of the Provincial Legislature was passed whereby the provisions of chapter 137 were made to apply to the County Courts, and by the last section it is enacted that "notwithstanding any doubts raised hereafter as to the power of any County Court Judge, or Commissioner for the relief of insolvent debtors, to release insolvent debtors in all cases where such debtors have been released in the County Courts since the passing of the Act to establish County Courts, the proceedings in such cases

shall be held to be valid and binding, and no action in any Court shall hereafter be taken or sustained by reason of any such proceedings being illegal or void." No judgment was given till the 2nd December, 1878, when judgment was given for the plaintiff for eight dollars.

If the action had been maintainable, it appears to me that nominal damages were all that the plaintiff was entitled to under the circumstances. There is no pretence for saying that the defendants acted otherwise than in good faith, believing that they were duly authorized to act as Commissioners and to grant the discharge of the prisoner, and no injury or loss is proved to have been sustained by the plaintiff in consequence. But the Judge was not, in my opinion, justified in ignoring the Act of 1878, which had passed many months before he gave judgment.

The language of the Act is so explicit that no doubt can exist that it was intended to apply to such a case as this, and I cannot think that it was beyond the power of the Provincial Legislature to pass it. It leaves the law on the subject just as it was when the B. N. A. Act passed. Then, by a Provincial Act in force, and not since repealed, every debtor imprisoned under process from any Court, was entitled to apply for his discharge, and when the County Courts were established it would have been competent, in my opinion, for the Legislature to have provided that prisoners arrested under process issuing from them, should be entitled to their discharge as in other cases, and that there was not such a provision was an unintentional mistake. It never could have been intended that debtors imprisoned under process from the higher Court, the Supreme Court, and the lower Court, that of the Justices of the Peace, should be entitled to their discharge, and those under process from the County

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Court should be liable to perpetual imprisonment. If the Legislature could have provided for the discharge of a prisoner in the Act establishing the County Courts, or could have enacted that their judgment should only be enforced by *fieri facias*, as I think it could, there can be no grounds for saying that the Act of 1878 is *ultra vires*. The part of the Act called into operation in this case is not so much what relates to the discharge of the debtor as that which indemnifies officers who have acted *bona fide* and, as they supposed, in the discharge of their duty. Considering that this was the case, and that the plaintiff did not in fact sustain any damage by their act, I think the suit should never have been brought. The appeal must be sustained with costs on the appeal, and the judgment below set aside, each party paying his own costs incurred in that Court.

NEW RRUNSWICK SUPREME COURT.

THE QUEEN *v.* CHANDLER.

1868
June 11

IN RE HAZLETON.

[*Reported 1 Hannay, 556.*]

Insolvency—B. N. A. Act, s. 91, sub-sec. 21.

An Act which provides for the examination of a debtor before a Judge, and which authorizes the Judge to grant the debtor a discharge from gaol or the limits as to the suit for which he was confined, on proof that he is unable to pay his debts, and that he has made no fraudulent transfer or undue preference, is an Insolvent Act which a Provincial Legislature has no power to pass since the B. N. A. Act came into force (1), and the assent of the Governor-General does not make such an enactment valid.

Mr. *S. R. Thomson*, Q.C., in Hilary Term last, obtained on affidavits a rule *nisi* for a prohibition to restrain James W. Chandler, Esq., one of the County Court Judges, from acting under an Act passed by the Local Legislature of New Brunswick, on the 23rd of March, 1868, entitled "An Act in amendment of chapter 124, title 34, of the Revised Statutes of Insolvent Confined Debtors," on the authority of which he was proceeding with an examination of Hazleton, an insolvent debtor confined in the common gaol of St. John, on a *ca. sa.* issued out of the Supreme Court. This Act provides that any person confined in gaol or on the limits in any civil suit may apply for his discharge to a Judge of the County Court, who may order the sheriff to bring the debtor before him for examination, which order the sheriff shall obey without being liable

(1) [But see Johnston *v.* Poyntz, *ante*, p. 416.]

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to an action for escape or otherwise. In pursuance of which order it is provided that the debtor and witnesses shall be examined, and if on such examination it shall appear to the satisfaction of the Judge that the debtor has no property except such as is by law excepted from levy under execution, and that since he was served with the first process in the suit in which said application was made he had not directly or indirectly transferred any property, real or personal, intending to defraud the person at whose suit he is confined, or given any undue preference, such Judge shall, by order in writing, discharge the debtor from confinement as to that suit. The Act also authorizes the appointment of commissioners to exercise the powers of County Court Judges, repeals ss, 1, 5, 8, 10 and 18 of c. 124, title 36, of the Rev. Statutes, 23 Vict. c. 28, and 26 Vict. c. 10. The grounds of the application were that the said Act was of no force or effect, it being an Act relating to insolvency, and therefore such an Act as the Local Legislature of New Brunswick had no right to pass, insolvency being one of the subjects assigned by the B. N. A. Act to the exclusive legislative authority of the Parliament of Canada, and that the Legislature of New Brunswick had no power to alter or vary in any way the law relating to insolvency, as it stood at the time the B. N. A. Act came in force.

Mr. *I. Allen Jack* shewed cause.

Formerly this Court had no power to say that an Act of the Legislature to which the Lieutenant-Governor had given his assent was not in accordance with the royal instructions. *Reg.* v. *Kerr* (1). (Ritchie, C. J.: That case does not apply here; we are now called upon to elect between two statutes. Where an Act of the British Parliament conflicts with our own, the

(1) Berton, 367.

latter must give way.) I contend that would only be where the interests of the people of the United Kingdom were in question. Here the Provincial Act has been approved by the Governor-General and by the Minister of Justice, the legal adviser of the Government, whose duty it is to advise upon the proceedings and the Acts of the Legislatures of the Provinces. (Ritchie, C. J.: You surely do not contend that the assent of the Governor-General would make an Act law, where there was no right to legislate.) An Act approved by the sole representative of Her Majesty under the advice of the legal adviser of the Crown, must have the force of law until disallowed by some higher authority or repealed. It is the duty of the Court to give effect to the Acts of the Legislature where they do not stultify themselves, and especially in this case where the Government of Canada have put a construction upon the B. N. A. Act and regarded our Provincial Act as not conflicting with it. I contend, also, that this is not an Insolvent Act, and therefore does not conflict with the B. N. A. Act The fact of the word "Insolvency" being used in the title does not shew it to be so, for the title is no part of the Act. An insolvent law simply provides for the distribution of the property and effects of a debtor, and his release from future liability. Dwarris on Stat., p. 754, says an Insolvent Act should be construed strictly, "because it gives away the property of the subject." It is clear that the present Act, which merely discharges the debtor from confinement as to the suit, will not come within either of those definitions. (Ritchie, C. J.: Is not this man now in gaol an insolvent debtor; and is it not by virtue of his insolvency that he seeks relief under this Act?) The B. N. A. Act, s. 92, sub-s. 14, makes procedure in civil matters in all Provincial Courts a matter within the exclusive control of the Local Legis-

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latures. The arrest and discharge of debtors are clearly proceedings in civil matters, and controlled by the Courts where the proceedings are had; neither the arrest of a person nor his discharge relate to insolvency.

Mr. *S. R. Thomson*, Q.C., contra:

This case is too clear for argument; it is absurd to say that the assent of the Governor-General can give effect to an unconstitutional Act or create a jurisdiction. The words of the B. N. A. Act are plain. This is clearly an Insolvent Act, and the Local Legislature in passing it have gone beyond the limits of their legislative power, and it now only remains for the Court to interpose its authority.

The judgment of the Court was delivered by

RITCHIE, C. J.:—

This was an application for a prohibition to James W. Chandler, Esq., one of the County Court Judges, to prohibit and control him from acting under an Act passed by the Local Legislature of this Province, on the 23rd of March, 1868, intituled "An Act in amendment of chapter 124, title 34, of the Revised Statutes of Insolvent Confined Debtors," on the authority of which he was proceeding with an examination of an insolvent debtor, confined in the Common gaol of the city and county of St. John, on a *ca. sa.* issued out of the Supreme Court on a judgment of the Court, on the ground that such Act was of no force or effect, and consequently the discharge of an insolvent confined debtor was a matter over which he, as a County Court Judge, had no jurisdiction. The contention on the part of the applicant is that the subject dealt with by the Local Legislature in that Act, is, by the B. N. A. Act, 1867, exclusively assigned to the Parliament of Canada, and comes within one of the classes

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of subjects—viz., bankruptcy and insolvency—to which the exclusive legislative authority of the Parliament of Canada extends, and so it was *ultra vires* of the Local Legislature to repeal or in any way alter the law as it stood at the time of the coming into operation of the B. N. A. Act, by passing any binding law in a matter so exclusively belonging to the Parliament.

The B. N. A. Act, 1867, which federally united into one Dominion, under the Crown of Great Britain and Ireland, the Provinces of Canada, Nova Scotia, and New Brunswick, after reciting that whereas on the establishment of the union by the authority of Parliament it was expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared, and after enacting by sec. 17 that there should be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons, declared by sec. 88 that the constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, *subject to the provisions of this Act*, continue as it exists at the union until altered under the authority of this Act. In a subsequent portion of the Act, the powers of Parliament and of the Provincial Legislatures were declared and defined under head 6, entitled "Distribution of Legislative Powers of Parliament." By sec. 91 it is "declared that, (*notwithstanding anything in this Act,*) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," of which No. 21 is Bankruptcy and Insolvency. And after an enumeration of all the classes of subjects thus exclusively assigned to the Parliament of Canada, it is at the end of the enumeration enacted that "any matter coming within any of the classes of subjects enumerated in this section shall not

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be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Thus, the exclusive right to legislate on the subjects enumerated is affirmatively vested, in general terms, as to all matters not coming within the class of subjects assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of such terms, the exclusive right is specifically extended in the enumeration of the subjects; and finally, by unequivocal words, it is declared that any matter coming within any of the enumerated classes of subjects shall not be deemed to come within the class of matters assigned exclusively to the Legislatures of the Provinces. It is difficult to conceive how the Imperial Parliament, in the distribution of legislative power, could have more clearly or more strongly secured, to the respective legislative bodies, the legislative jurisdiction they were respectively exclusively to exercise.

We have now to see whether the Act complained of deals with a subject exclusively delegated to the Parliament of Canada. "In construing an Act of Parliament, a deed, or a contract, we ought to read the words in their ordinary sense, and not depart from it unless it is perfectly clear from the context that a different sense ought to be put on them," per Pollock, C. B., in *Caine* v. *Horsfall* (1). There is certainly nothing in the B. N. A. Act to shew that the word insolvency is used in any other than the ordinary sense. "Insolvency," the Dictionary (Imperial) tells us, means "inability of a person to pay all his debts, or the state of wanting property sufficient for such payment. Insolvency is a term in mercantile law applied to designate the condition of all persons unable to pay their debts according to the ordi-

(1) 1 Ex. 522.

nary usage of trade." The legal meaning of the term insolvency has been judicially declared in numerous cases. Thus, in *Bayly* v. *Schofield* (1), Bayley, J., says the term insolvency "means that a trader is not able to keep his general days of payment." And in *Biddlecombe* v. *Bond* (2), where the expression in an agreement was "shall have become bankrupt or insolvent," being insolvent was held to mean general inability to pay debts, and did not signify taking the benefit of the Insolvent Debtors Acts, though the word occurred in company with bankrupt, unless the context so restrained it. So in *Parker* v. *Gossage* (3), where by the agreement "bankruptcy or insolvency" was to terminate the contract, Parke, B., says: "The ordinary import of the word insolvency is an incapability of paying the party's just debts; the context may shew it to be used in a different sense," and on the counsel *arguendo* saying that the same argument might shew that the word bankrupt was used in its natural sense, Lord Abinger, C. B., says: "The natural sense of that word is, a man who has been bankrupt according to law, though it is metaphorically used to denote an insolvent person. The word insolvency is added here to enlarge the sense."

Bankrupt laws are intended to secure the application of the effects of the debtor to the payment of his debts, and then to release him from the weight of them. Bankruptcy originally, in the English law, was applicable only to traders or persons who got their livelihood by buying or selling for gain, and did certain acts which afforded evidence of an intention to avoid payment of their debts; but modern legislation in England has enlarged the description of persons subject to the bankrupt laws. The insolvent law differed from the bankrupt system, it not being confined in its opera-

(1) 1 M. & S. 338, 354. (2) 4 A. & E. 332. (3) 2 C. M. & R. 617, 620.

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tion to any particular class, but being applicable to the whole community, and, considered in its origin in England, is comparatively of modern introduction. For though provisions were made in England for the relief of persons in gaol by 32 Geo. II. c. 28 (Lords Act), and 48 Geo. III. c. 123, the 53 Geo. III. c. 102 (1813), called "Lord Redesdale's Act," was the first that established a general system for the relief of insolvent debtors. Numerous Acts have since been passed, and, finally, by 24 & 25 Vict. c. 134, sec. 1, the jurisdiction, etc., exercised by the Courts then existing for the relief of insolvent debtors, was transferred to and vested in the Court of Bankruptcy.

The distinction between insolvent and bankrupt laws has been more discussed in the neighbouring Republic, where, while the power of passing bankrupt laws is conferred on the Legislature of the Union, the power of enacting insolvent laws is confined to the individual States. In *Sturges* v. *Crowninshield* (1), the Chief Justice says: "The insolvent laws of many, indeed of by far the greater number of the States, discharge the person of the debtor, but leave his obligation to pay in full force;" and Chancellor Kent, in speaking of the distinction between bankrupt and insolvent laws, says: "There is a marked difference in general between bankrupt and insolvent laws, for while the bankrupt may be discharged from his debts, the insolvent debtor is usually only discharged from imprisonment. But the line of partition between bankrupt and insolvent laws is not so distinctly marked as to enable any person to say with positive precision what belongs to the one and not to the other class of laws. It is difficult to discriminate with accuracy between bankrupt and insolvent laws, and therefore a bankrupt law may contain

(1) 4 Wheaton, 122, 203.

those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law." The distinction was of importance in the United States, because, as before observed (according to Kent, 2 vol., 570), the Legislature of the union possesses the power of enacting bankrupt laws, and those of the States the exclusive power of enacting insolvent laws. In this Dominion the wisdom of Parliament has entirely relieved us from any difficulty of a similar character that might arise between Parliament and the Local Legislatures, by placing the power to legislate, on both bankruptcy and insolvency, exclusively in Parliament. Mr. Stephens, in discussing the title "insolvency," after referring to the statutes that have been passed for the relief of insolvent debtors, says: "The particulars of the system so established, it is our purpose in what follows to explain; its effects, in the meantime, may be briefly stated thus: that it takes from the plaintiff altogether the power of prolonging at his own pleasure the period of the defendant's durance, and enables the latter immediately on his imprisonment to petition for his discharge from it, upon consideration of his estate being transferred for the benefit of his creditors in general, and to obtain that discharge, unless a case of fraud, malicious injury, or other misconduct be established, as soon as the forms of proceeding connected with the surrender can be satisfied."

We have always in this Province had laws of this character, at any rate since the 31 Geo. III., when the first law in the nature of an Insolvent Act was passed, intituled "An Act for the support and relief of Confined Debtors." This Act having expired, was revived and continued by the 36 Geo. III. c. 3, which Act being near expiring, and the support and relief extended thereby having been found expedient and necessary,

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the 41 Geo. III. c. 5, was passed, whereby prisoners for debts not exceeding £200, unable to support themselves, might, after fourteen days confinement, apply to a Judge of the Supreme Court for a weekly support and maintenance; and the Judge, after notice to the creditor, was to examine the debtor or witnesses on oath, and if the debtor was found utterly unable to support himself, the Judge was to order the creditor to pay the debtor a weekly sum for his support; in default of payment, the debtor to be discharged, with a proviso that nothing done under the Act was to prevent the creditor from prosecuting his suit against the estate and effects of the debtor. The 10 and 11 Geo. IV. repealed all Acts in force for the relief and support of insolvent confined debtors, and made other and more effective provisions in lieu thereof. This was amended by the 1 Wm. IV. c. 43, which was continued by 2 Wm. IV. c. 13, amended by the 3 Wm. IV. c. 18, continued by 4 Wm. IV. c. 37, and repealed by the 6 Wm. IV. c. 41, entitled "An Act relating to Insolvent Confined Debtors." This Act, in addition to provisions of a character similar to those of the 4 Geo. III. c. 5, contained clauses under which prisoners not strictly entitled to the benefit of the Act, after one year, might apply to the Supreme Court for relief, and if it should appear that he had no property to satisfy the debt or support himself, the Court might, in its discretion, order either maintenance or discharge, and after receipt of weekly allowance for one year, the debtor to be discharged from confinement, preserving to the creditor his remedy against the goods and lands. This Act contained a variety of other provisions, not necessary to be noticed, except, perhaps, sec, 11, by which confined debtors possessed of property might offer the same to the confining creditor, and if he refused to take it or the pro-

ceeds, the debtor might assign, or pay over the same to any other *bona fide* creditor, after which the debtor might have the benefit of the Act.

In 1844 the 7 Vict. c. 32 was passed, entitled "An Act to afford relief to persons unfortunate in business in certain cases." After reciting that "Whereas it is deemed expedient to make some further provision for the relief of insolvent debtors, and for enabling them to make arrangements with their creditors, by which they may obtain a discharge from their debts," enacted that any debtor or joint debtors finding himself or themselves unable to meet his or their engagements, might make application, by petition, to the Master of the Rolls for an order for a public meeting of his creditors, and fuller provisions for enabling the debtor to offer a composition to his creditors, and enabling him, under certain circumstances, to obtain a discharge from his liabilities. This Act, which was more in the nature of a (1845) Bankrupt than an Insolvent Act, was amended by 8 Vict. c. 94, and repealed by 9 Vict. c. 58, and so the law stood, with trifling amendments, until the Revised Statutes, 17 Vict., which by title 34, c. 124, of Insolvent Confined Debtors, substantially re-enacted similar provisions.

In 1858, by 21 Vict. c. 17, an Act was passed to amend the law for the relief of insolvent debtors, but which was really more in the nature of a Bankrupt Act, by which various provisions were made whereby any debtor owing debts to the amount of £100, or upwards, might apply to the clerk of the peace, who should call a meeting of the creditors, and enable the debtor to offer composition, which, if not accepted, authorized assignees to be chosen, and the property of the debtor at the time of the notice of calling the meeting to be dealt with by assignees, and enabling the debtor to apply

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for discharge from all his debts after composition or assignment. This Act was repealed, except as to proceedings already commenced by 22 Vict. c. 16, and the 11th sec. of c. 124, title 34, of Insolvent Confined Debtors, was amended by 22 Vict. c. 17, and sec. 1, by 23 Vict. c. 28, and by 26 Vict. c. 10, whereby any person confined in gaol, or on the limits for six months, might apply to a Judge of the Supreme Court, who, on being satisfied the debtor had no property or means of support, and that he had applied for weekly support without success, the Judge might, in his discretion, order either maintenance or discharge, the decision of the Judge to be final, and sec. 9 of c. 124, title 34, was repealed. By 30 Vict. c. 10 (County Court Act), sec. 32, the several County Courts, and the respective Judges thereof, shall have and exercise all the powers and authority vested in the Supreme Court, or the Judges thereof respectively, by c. 124, title 34, of the Revised Statutes of Insolvent Confined Debtors, and of c. 125, title 34, of the Revised Statutes of Absconding, Concealed and Absent Debtors, and also of an Act made and passed in the 26th year of the reign of her present Majesty Queen Victoria, in c. 10, entitled "An Act to amend c. 124, title 34, of the Revised Statutes of Insolvent Confined Debtors, and of any other Act or Acts in amendment thereof."

This is a brief reference to the laws in the nature of insolvent laws passed from time to time in this Province, and conveys a general idea of the state of the law in force on the 1st July, 1867, when the B. N. A. Act came into operation. If ever Acts were passed relating to insolvency, these (except, perhaps, the repealed Acts of 21 Vict. c. 17, and 7 Vict. c. 32), assuredly are peculiarly of that character. They are based solely on the utter inability of the debtor to pay

his debts or support himself, and being so insolvent in the full, ordinary and legal sense of that term, they deal with his insolvency, and provide specially and primarily for his personal discharge, and incidentally for the disposition of any property he may possess, it being, we think, very evident that the Legislature contemplated that as those for whose benefit the Act was passed were in actual custody, the great bulk of them were utterly insolvent, with no available means for the discharge of their obligations, or even for their personal support in custody, and the system thus established comes peculiarly within the distinction pointed out by Chancellor Kent, in discriminating between bankrupt and insolvent laws, and seems to be entirely analogous to the insolvent laws of both England and the United States.

On the 23rd March, 1868, the Provincial Legislature of this Province passed an Act, entitled "An Act in amendment of c. 124, title 34, of the Revised Statutes of Insolvent Confined Debtors;" the Act under which Judge Chandler is acting, and from proceeding under which we are now asked to prohibit him. By this Act it is provided that any person confined in gaol, or on the limits, in any civil suit, may apply for his discharge to a Judge of the County Court, who may order the sheriff to bring the debtor before him for examination, which order the sheriff shall obey, without being liable to an action for escape, or otherwise. In pursuance of which order it is provided that the debtor and witness may be examined, and if on said examination it shall appear to the satisfaction of the Judge, that the debtor has no property, except such as is by law excepted from levy under execution, and that since he was served with the first process in the suit in which said application was made, he had not, directly or indirectly, trans-

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ferred any property, real or personal, intending to defraud the person at whose suit he is confined, or given any undue preference, such Judge shall by order in writing discharge the debtor from confinement as to that suit. It then authorizes the Governor in Council to appoint commissioners to exercise the powers of Judges of the County Court, and repeals sections 1, 5, 8, 10 and 18 of c. 124, title 34, of the Revised Statutes, also 23 Vict. c. 28, entitled "An Act to amend the law relating to Insolvent Confined Debtors," and also 26 Vict. c. 10, entitled "An Act to amend c. 124, title 34, of the Revised Statutes of Insolvent Confined Debtors." But it is declared that all the provisions of c. 124 of the Revised Statutes, and of any Acts in amendment thereof or relating thereto, except as therein repealed or is inconsistent therewith, shall be and was thereby made to be in force in respect to the provisions of this Act. That branch of the insolvent system which the Local Legislature has attempted to alter is, it is true, exclusively applicable to insolvent confined debtors; but it is not the less a matter relating to insolvency, and we are at a loss to understand how it can be argued that it is not a matter coming within that class of subjects—viz., bankruptcy and insolvency—enumerated in the B. N. A. Act as assigned exclusively to the Parliament of Canada.

It has been argued that notwithstanding it may be so within that statute, the Act of the Local Legislature having been passed by the House of Assembly and Council, assented to by the Lieutenant-Governor, and confirmed by the Governor-General, this Court is bound to recognise and give effect to it as the law of the land, and the case of *Reg.* v. *Kerr* (1) has been cited and relied on to establish this position. But it is our opinion that case has no bearing on the question tending to sup-

(1) Berton, 367.

port the view put forward. That case was decided when, in the language of Chipman, C. J., "The Lieutenant-Governor, Legislative Council and Assembly, form the legislative body in this Province, subordinate, indeed, to the Parliament of the mother country, and subject to its control, but, with this restriction, they have the same power to make laws binding within the Province that the Imperial Parliament has in the United Kingdom; and it is every day practice, both in the mother country, and the colonies, to make laws abridging the exercise of private rights where the public good requires it. The propriety and necessity of such enactments are within the competency of the Legislature alone to determine;" adding "It is a thing unheard of under British institutions, for a judicial tribunal to question the validity and binding force of any such law when duly enacted. While the law remains on the statute book, the courts are absolutely bound to give effect to it." And after speaking of a peculiarity in colonial legislation, not bearing on this point, he says: "But a law passed in proper form by the Provincial Legislature," with this most important qualification "(at least a law not objectionable on account of its repugnancy to an Act of Parliament relating to the colonies), goes into force, and must be executed, subject to being disallowed by the Sovereign," and Mr. Justice Parker agreed with the counsel "so far as to think that cases may occur in which the Court would be bound to pronounce its opinion upon the validity of an Act of Assembly; for instance, when it conflicts with an Act of the Imperial Parliament."

What was propounded in this case was doubtless good law at the time, and under the circumstances under which it was delivered; but as it is applicable at the present day to the case before us, so far from support-

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ing defendant's contention, it is directly against it. The B. N. A. Act entirely changed the legislative constitution of the Province; the Imperial Parliament has intervened, and by virtue of its supreme legislative power, has taken from the subordinate legislative body of this Province the plenary power to make law, which it formerly possessed, by depriving it of the right to legislate in all matters coming within certain enumerated classes of subjects, and has, within the Dominion of Canada, delegated the sole right to deal with such matters to the exclusive legislative authority of the Parliament of Canada, insolvency being one of these subjects, and the Local Act, the validity of which is now questioned, treating of matters, in our opinion, directly within that subject, the Act in question being an Insolvent Act in the strictest sense of the term, there arises an undoubted conflict between the statute of the Imperial Parliament and such Act of the Local Legislature, and presents the case suggested by Mr. Justice Parker, where we are bound to pronounce our opinion on the validity of the Local Act. The Imperial statute says that the Parliament of Canada shall exclusively legislate on bankruptcy and insolvency; in other words, that the inhabitants of the Dominion shall be bound only by laws passed after the 1st July, 1867, within the Dominion on these subjects, by the Parliament of Canada. The subordinate legislative body of this Province, in defiance of this statute, has undertaken to legislate on this subject, and by so doing seeks to bind the inhabitants of this portion of the Dominion by their Act. Their right to do so is now contested, and under these circumstances can there be any doubt as to what we are bound to do? We think not. We must recognise the undoubted legislative control of the British Parliament, and give full force and effect to the statute of the Supreme Legislature, and

ignore the Act of the subordinate, when, as in this case, they are repugnant and in conflict. The general and large legislative power which the Local Legislature formerly had, as put forward by Chief Justice Chipman, they do not now possess; their powers are now controlled and limited by the Imperial statute. While in certain cases they have the exclusive right within the Dominion, in others, on which formerly they might have legislated, all right is taken from them. The constitution of the Dominion and Provinces is now, to a great extent, a written one, and where under the terms of the Union Act the power to legislate is granted to be exercised exclusively by one body the subject so exclusively assigned is as completely taken from the others as if they had been expressly forbidden to act on it; and if they do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body.

The fact of this Act having been confirmed by the Governor-General was much relied on as giving it a binding force and effect, but we fail to see how this can be. No power is given to the Governor-General to extend the authority of the Local Legislature, or enable it to override the Imperial statute, which would be the necessary result if the Local Legislature could, by assuming the right to legislate on a prohibited subject, have their action legalized, and validity given to their Acts by the simple confirmation of the Governor-General, thus making the individual act of the Local Legislature, or of the Governor-General, or their united acts, superior to the Parliament of Great Britain. Fortunately, no great practical inconvenience can hereafter arise by reason of the Local Legislature having exceeded its powers; in this instance the result simply is that the order must go to prohibit the County

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Court Judge from proceeding or acting under the Acts passed by the Local Legislature subsequently to the coming into operation of the B. N. A. Act, 1867, altering, amending, or repealing the laws relating to insolvent confined debtors, but only so far as they legislate on the matter of insolvency, the jurisdiction, however, of the County Courts and their respective Judges remaining unimpaired under the laws of this Province relating to insolvency as existing when the B. N. A. Act, 1867, came into force.

The sooner the respective legislative bodies of the Dominion realize the full effect of the change in the constitution of the country, and the fact of their present limited powers of legislation, the less likely is it that any conflict of law will arise, or the judicial tribunals be called upon to ignore laws passed in an apparently legitimate way, and in a manner hitherto properly considered by the people as obligatory. And they will be saved the difficult task of deciding more doubtful intricate questions, sure to arise if caution is not observed. For it is well said by that distinguished jurist, Chancellor Kent, "*conflictus legum* is the most perplexing and difficult title of any in the jurisprudence of public law." Nothing can be gained by exceeding the limits fixed, but much inconvenience and loss must result to individuals, and the public interests be jeopardized; for in all usurped jurisdictions the usurpation can operate only to lower in public estimation the legislative or judicial body by which jurisdiction not rightly belonging to it is grasped.

If any doubt exists as to the correctness of the conclusions at which we have arrived, we should, though entirely clear in our own minds, earnestly desire that an appeal should be taken, so that this important constitutional question may be forever set at rest by the final determination of Her Majesty, under the advice of the Judicial Committee of the Privy Council of Great Britain.

NEW BRUNSWICK SUPREME COURT.

EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY FOR EXTENSION FROM ST. JOHN WESTWARD *v.* THOMAS.

1871*
April 18.

[*Reported 1 Pugsley, 42.*]

Local Works and undertakings—B. N. A. Act, s. 92, sub-s. 10—32 Vict. c. 54, N. B.

By an Act of the Province of New Brunswick, passed prior to Confederation, the plaintiff company was incorporated for the purpose of constructing a railway from the City of St. John, in that Province, westward to the boundary of the United States. After Confederation another Act (32 Vict. c. 54) was passed for the purpose of removing doubts respecting the liability of subscribers for shares in the company, and this latter Act was held to be within the competence of the Provincial Legislature.

The fact of the Legislature of a foreign country authorizing the construction of a line of railway in that country for the purpose of connecting with a Provincial railway does not in any way affect the authority of the Legislature of the Province to legislate with respect to the railway within the bounds of the Province. (1)

The defendant, being a stockholder in the plaintiff's company, refused to pay certain calls made on his stock, and the present action was brought to enforce their recovery. At the trial before the Chief Justice at the Saint John Circuit in January, 1871, a verdict was found for the plaintiff with leave reserved to enter a nonsuit.

Feb. 10, 1871. Mr. *Duff*, Q.C., moved for and obtained a rule *nisi* for a nonsuit on the ground (among others) that the Act 32 Vict. c. 54 was *ultra vires* of the Local Legislature, because the Western Extension Railway was

*Present:—RITCHIE, C.J., and ALLEN, WELDON and FISHER, JJ.
(1) [See also Dow *v.* Black, L. R. 6 P. C. 272; *ante*, vol. 1, p. 95.]

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part of a scheme for a continuous railway extending through the Province into the State of Maine, in the United States.

Mr. *A. L. Palmer*, Q.C., and Dr. *Barker*, Q.C., shewed cause.

Mr. *Duff*, Q.C., and Mr. *S. R. Thomson*, Q.C., in support of the rule.

RITCHIE, C. J.:—

This was an action against the defendant as a shareholder in the E. & N. A. Railway Company for certain calls. The plaintiffs were incorporated by the 27 Vict. c. 43, whereby certain persons, including the defendant, were made and constituted a body politic and corporate by the name of "The European and North American Railway Company for extension from St. John Westward;" the object of the incorporation being to enable them to construct a railroad "from the city of St. John, in the county of St. John, in this Province, westward, to the boundary of the United States." The 30 Vict. c. 6 and 30 Vict. c. 12 were subsequently passed in aid of this undertaking, but no question arises in this case under the provisions of either. In 1869 the 32 Vict. c. 54, an Act to amend the 27 Vict. c. 43, was passed, which has a most important bearing on many of the questions raised, and, therefore, of the many points submitted for our consideration, it will be most convenient first to dispose of the one which presents the question as to the validity of the Act 32 Vict. c. 54, as on this a number of the other questions are dependent.

It was contended that this Act was *ultra vires* the Local Legislature, and therefore void—that under the B. N. A. Act, 1867, sec. 92, sub-sec. 10, paragraph (*a*), it was withdrawn from the class of subjects on which the

Provincial Legislatures might legislate, and that by force of section 91, which declares the matters over which the Parliament of Canada should have exclusive legislative authority, it belonged exclusively to that Parliament. Under section 92, which enumerates the matters confided exclusively to the Local Legislature, we have by sub-sec. 10 "Local Works and undertakings *other than such as are of the following classes*," then follow three paragraphs *a*, *b*, and *c*, of excepted classes. Paragraph (*a*) is the only one that bears on the subject before us. It reads thus: "Lines of Steam or other Ships, Railways, Canals, Telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province." Under section 91, which specifies the classes of subjects assigned exclusively to the Parliament of Canada, by sub-section 29 we have, "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." It is contended that the subject-matter of this Act comes within one of such exceptions, and is, therefore, beyond the power of the Provincial Assembly.

The 27 Vict. c. 43, of which the Act under consideration is an amendment, is an Act to incorporate "the E. & N. A. Railway Company for extension from St. John, westward," and authorizes the company so incorporated to locate and construct and finally complete a railroad "from the City of St. John in this Province, westward, to the boundary of the United States." Such a railway, if constructed, clearly does not connect this Province with any other or others of the Provinces, and, without stopping to notice the marked difference of the language "connecting the Province with any other or others of the Provinces," and "*extending beyond the limits of the Province*," can we say a railway extends beyond the limits

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of the Province when its location, construction and completion is actually confined within the Province, and when it is limited in its extent "to the boundary of the United States," but not authorized to go one inch beyond?

But it was claimed to have been shewn by evidence outside the Act that, at the time it was passed and also at the time of the passing of the 32 Vict. c. 54, it was contemplated and intended by the promoters of the undertaking to connect with a line of railway to "be built in the State of Maine, in the United States, to meet the E. & N. A. Railway for extension from St. John, Westward," at the boundary of the United States, and, therefore, it is contended, it was a railway extending beyond the limits of the Province. But we think we have no right to look to intentions, or anticipations, or doings of parties outside the Provincial Legislature, either in the State of Maine or in the Province of New Brunswick, and that the intention of the Legislature, as expressed in the Act, alone can control us—that the fact of the Legislature of the State of Maine authorizing, or its people intending to construct, or actually constructing, a line of railway in that country, cannot in any way affect the authority of our own Legislature to legislate on, and deal with railway undertakings, provided always such railways do not connect the Province with any other or others of the Provinces, nor extend beyond the limits of the Province. This is the simple question, and all we have to consider in determining on the validity of the Act. As to any possible or probable connection of the railway authorized to be constructed under this Act (which may have been thought of at the time of passing the Act), with a line or lines of railway to be constructed, not under the authority of these Acts, in the United States, we have nothing to do. We therefore think this is a local work and undertaking other than such as are of the classes

enumerated in paragraphs *a*, *b* and *c* to sub-sec. 10 of sec. 92, and, in relation to which, the Legislature of this Province may exclusively make laws.

[The remainder of the Chief Justice's judgment has no reference to the constitutional question, and is therefore omitted.]

ALLEN, J.:—

The principal questions arising in this case are, 1st, Whether a stockholder is liable to be sued for calls under the Act incorporating the company (27 Vict. c. 43); and 2nd, Whether, if not so liable under that Act, a right of action is given to the company by the Act 32 Vict. c. 54.] After disposing of those objections, the learned Judge said, p. 66 :—]

On the other point, as to the Act being beyond the powers of the Local Legislature under the B. N. A. Act, 1867, I do not think there is anything in the objection; but, as that question has been fully dealt with by His Honour the Chief Justice in his judgment, it will be unnecessary for me to make any observations upon it.

[WELDON, J., concurred in the judgment, but did not discuss the constitutional question.]

FISHER, J. :—

Assuming that no action would lie for calls under the 27 Victoria because of the non-compliance with its provisions in several respects, the plaintiffs' right to recover must depend entirely upon the 32 Victoria, to which several objections have been taken. It is said to be *ultra vires;* and, if it is not, that the Act itself does not sufficiently cure certain defects in the proceedings of the plaintiffs, that there are other conditions precedent to the plaintiffs' right to recover which are not stated in the preamble, and, therefore, that the enacting clauses of the

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Act do not operate to remove that difficulty, but only the defects which are so stated in the preamble, and that, in any state of things, the plaintiffs cannot recover for calls until after the stock has been forfeited and sold. By the B. N. A. Act, section 92, clause 10, exclusive power is conferred upon the Local Legislature to make laws in relation to local works and undertakings, "other than lines of Steam or other Ships, Railways, Canals, Telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province." The object of this section was to limit the power to authorize such works to the Parliament whose authority extends over the whole Dominion.

[The remainder of the judgment is omitted the same having no reference to the constitutional question.]

NEW BRUNSWICK SUPREME COURT.

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February.

EX PARTE RENAUD.

[*Reported 1 Pugsley, 273.*]

Denominational Schools—B. N. A. Act, s. 93—34 Vict. c. 21, N.B.

The provision contained in sect. 93 of the B. N. A. Act that nothing in any law made by a Province in relation to education "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union," protects those legal rights and privileges only which existed in each Province at the Union, by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal right.

At the Union the law with respect to schools in the Province of New Brunswick was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to denominational schools, and a subsequent Act, 34 Vict. c. 21, providing that the schools conducted thereunder should be non-sectarian, was therefore held to be valid.

The constitutionality of the Act 34 Vict. c. 21 cannot be affected by any regulations of the Board of Education, made under its authority; and, *Semble*, if the Board of Education, have made regulations which they ought not to have made, or have not made regulations which they should have made, the case falls within sub-section 4 of sect. 93 of the B. N. A. Act.

This case came before the Court on an application for a *certiorari* to remove an assessment for school purposes, made on the parish of Richibucto, in the county of Kent, on the ground that the Common Schools Act, 1871, (1) was

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* Present:—RITCHIE, C. J., and ALLEN, WELDON, FISHER and WETMORE, JJ.

(1) [See Dominion Sessional Papers for 1877, No. 89, pp. 155, 343, where the correspondence and proceedings with reference to this Act are set out in full.]

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STATEMENT.

beyond the powers of the Local Legislature, and consequently void and of no effect; a rule *nisi* having been obtained in Michaelmas Term, 1870.

Mr. *King*, A. G., Mr. *A. L. Palmer*, Q.C., Mr. *Fraser*, and Dr. *Barker* shewed cause.

Mr. *Duff*, Q. C., Mr. *S. R. Thomson*, Q.C., Mr. *James* and Mr. *C. W. Weldon* were heard in support of the rule. The arguments of counsel are referred to in the judgment of the Court.

The judgment of a majority of the Court (Ritchie, C. J. and Allen and Weldon, JJ.) was delivered by

RITCHIE, C, J.:—

We are asked to set aside the assessment in this case, on the ground that the Legislature had no power or authority to enact the law under which such assessment was levied—The Common Schools Act, 1871—inasmuch as, it is contended, it contravenes the B. N. A. Act, 1867, and is consequently void and of no effect. We have never doubted that, when a Provincial Act and an Imperial Statute are repugnant, so far as such repugnancy extends, but no further, the Provincial Act is void; and this principle has been, since the passing of the B. N. A. Act, 1867, on several occasions enunciated and acted on in this Court; and we should not have thought it necessary now to refer to it, still less to support by authorities the views we have always entertained on this point (without any doubts), were it not that we observe that in the neighbouring Province of Quebec the question has been much discussed, and the Court divided in their opinions on the subject, though the majority arrived at the same conclusion as that which has hitherto governed this Court.

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We have always thought it a constitutional principle, too clear to be seriously questioned, that the subordinate legislative power of a Colonial Legislature must succumb to the supreme legislative power and control of the Parliament of Great Britain, and therefore have heretofore considered it wholly unnecessary to cite any authority; but as there is a clear statutory recognition, as well as the highest judicial declaration in support of the accuracy of the view we have acted on, we think it as well now to name them. In the Imperial Act 28 and 29 Vict., c. 63, sec. 2, it is enacted—that "any colonial law which is, or shall be, in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." And sect. 3 says—"No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid." And this statute has undergone judicial comment in the case of *Phillips* v. *Eyre* (1), where Willes, J., in delivering the judgment of the Exchequer Chamber, in stating the effect of this statute, after putting forward what has always been considered law in this Province, viz., that an English statute only binds the Province when it is by the express words of the statute, or by necessary intendment, made clearly applicable to the Province, says —"It was further argued that the Act in question (an Act passed by the Legislature of Jamaica) was contrary

(1) L. R. 6 Q. B., p. 20.

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to the principles of English law, and therefore void. This is a vague expression, and must mean either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign state. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial Act, means repugnancy to an Imperial statute or order made by authority of such statute applicable to the colony by express words or necessary intendment, and that so far as such repugnancy extends, and no further, the colonial Act is void."

But long prior to the passing of either the 28 and 29 Vict., c. 63, or the B. N. A. Act, 1867, the judiciary of England authoritatively declared what the law was on this subject, in answer to a question propounded to the judges by the House of Lords.

On the fourth day of May, 1840, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the judges (with the exception of Lord Denman and Lord Abinger, who did not attend the meeting of judges) upon the questions of law propounded to them, respecting the Clergy Reserves (Canada) Act. In answer to the question lastly propounded (question 3), which is as follows:—"Whether the Legislative Council and Assembly of the Province of Upper Canada, having, in an Act 'To provide for the sale of the Clergy Reserves, and for the distribution of the proceeds thereof, enacted that it should be lawful for the Governor, by and with the advice of the Executive Council, to sell, alienate, and convey in fee simple all or any of the said Clergy Reserves; and having further enacted in the same Act that the proceeds of past sales of such Reserves which have been or may be invested under the authority of the Act of the Imperial Parliament, passed in the seventh and

eighth years of the reign of his late Majesty King George the Fourth, intituled 'An Act to authorize the sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada,' shall be subject to such orders and directions as the Governor in Council shall make and establish, for investing in any securities within the Province of Upper Canada, the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said Reserves or any part thereof, did in making such enactments, or either of them, exceed their lawful authority;" his Lordship said —"In answer to the question lastly propounded, we all agree in the opinion, that the Legislative Council and Assembly of the Province of Upper Canada have exceeded their authority in passing the Act 'To provide for the sale of the Clergy Reserves, and for the distribution of the proceeds thereof,' in respect of both the enactments specified in your Lordships' question. As to the enactment, that it should be lawful for the Governor, by and with the advice of the Executive Council, to sell, alienate, and convey in fee simple, all or any of the Clergy Reserves, we have, in answer to the second question, already stated our opinion to be such, as that it is inconsistent with any such power in the Colonial Legislature; and as to the enactment, 'that the proceeds of all past sales of such Reserves, which have been or may be invested under the authority of the Act of the Imperial Parliament, passed in the seventh and eighth George Fourth, for authorizing the sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada, shall be subject to such orders and directions as the Governor in Council shall make and establish for investing in any securities within the Province of Upper Canada the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said Reserves;' we think

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such enactment is, in its terms, inconsistent with and contradictory to the provisions of the statute of the Imperial Parliament, seventh and eighth George Fourth, and therefore void, there being no express authority reserved by that Act to the Colonial Legislature to repeal the provisions of such latter statute."

Assuming, then, that it is not only the right, but the bounden duty of this Court to deal with questions of this nature when legitimately presented for its consideration, we must endeavour to ascertain whether there is such a repugnancy in this case as will constrain us to declare "The Common Schools Act," 1871," void in part or in whole.

It is contended that the rights and privileges of the Roman Catholic inhabitants of this Province as a class of persons, have been prejudicially affected by the Common Schools Act, 1871, contrary to the provisions of sub-section 1 of section 93 of the B. N. A Act. We have now to determine whether any class of persons had, by law in this Province, any right or privilege with respect to denominational schools at the Union, which are prejudicially affected by the Common Schools Act of 1871. This renders it necessary that we should, with accuracy and precision, ascertain exactly what the state of the law was with reference to denominational schools, and the rights of classes of persons in respect thereto, at the Union. At that time, what may fairly and legitimately be called the Common School system of the Province, was carried on under an Act passed in the 21 Vict. c. 9, intituled "An Act relating to Parish Schools." There were, no doubt, at the same time in existence, in addition to the schools established under the Parish School Act, schools of an unquestionably denominational character, belonging to, and under the immediate government and control of particular denominations, and in which there can be no doubt, or it

may reasonably be inferred, the peculiar doctrines and tenets of the denominations to which they respectively belonged were exclusively taught, and therefore had, what may rightly be esteemed, all the characteristics of denominational schools, pure and simple. We do not here refer to Collegiate Institutions, which it has been strongly and with great force urged, were not within the contemplation of the Imperial Parliament, or intended to be affected by the B. N. A. Act, 1867; but we refer to such schools as the Wesleyan Academy, Sackville, as incorporated by the 12 Vict. c. 65, amended by 19 Vict. c. 65, a corporation entirely distinct in law, as we presume also, in fact, from the College which the trustees of that Academy are authorized to found and establish under the 21 Vict. c. 57; an institution entirely under the control of the Wesleyan denomination, and in which, or in any department thereof, or in any religious service held upon the said premises, it is enacted that no person shall teach, maintain, promulgate or enforce any religious doctrine or practice contrary to what is contained in certain Notes on the New Testament, commonly reputed to be the Notes of the Rev. John Wesley, A.M., and in the first four volumes of Sermons, commonly reputed to have been written and published by him. The Varley School, endowed by the late Mark Varley, who bequeathed certain property "To the Trustees of the Wesleyan Methodist Church of the City of Saint John, for the establishment and maintenance of a day school," which devise was confirmed by the 13 Vict. c. 2, and the property vested in certain persons, viz., the Trustees of said Wesleyan Methodist Church in the City of Saint John, in connection with the British Conference, upon the trusts, etc., in said will. The Madras School, which by its charter is to be conducted according to the system called the Madras system, as improved by Dr. Bell, and in use and

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practice in the British National Education Society, incorporated and established in England; which National Society, established in 1811, was incorporated in 1817, for promoting the education of the poor in the principles of the Established Church throughout England and Wales; the schools established by such Society being purely denominational, in which the children are to be instructed in the Holy Scriptures, and in the Liturgy and Catechism of the Established Church, and, "with respect to such instruction the schools are to be subject to the superintendence of the parochial clergyman, and the master and mistresses are to be members of the Church of England." And the Baptist Academy or Seminary—the Roman Catholic School, established in the City of Saint John—the Free School in Portland, under the Board of Commissioners of the Roman Catholic School in Saint John—the Roman Catholic School in Fredericton—the Roman Catholic School in Saint Stephen—the Roman Catholic School in Saint Andrews—all of which are recognised by name by the Legislature in various Acts anterior to the 21 Vict. c. 9, and received specific annual grants from the Public Provincial Funds, outside the Parish School Act.

In the year 1857, and subsequently thereto, the money intended for educational purposes has been annually granted in a lump sum, viz., so much "to provide for certain educational purposes," not specifying any particular school or purpose, as had been heretofore customary. But the estimates of the public expenditure, which appear in the public Journals, shew that appropriations of a similar character have been since annually made. Thus in the year 1867, but before the 1st day of July (the day of the Union), it will be seen by the Journals of the House of Assembly, page 45, that in addition to the amount authorized by law, the following schools, among others,

received special grants, viz.:—The Madras School; the Wesleyan Academy; the Baptist Seminary; the Roman Catholic School, Fredericton; the Presbyterian School, Saint Stephen; the Roman Catholic School, Saint John; the Varley School, Saint John; the Roman Catholic School, Milltown; the Roman Catholic School, Saint Andrews, male and female; the Roman Catholic Schools, Carleton, Woodstock, Portland, and Bathurst; the Presbyterian School, Chatham; Roman Catholic School, Newcastle; and the Sackville Academy; and in the Journals for 1871, the year the Common School Law passed, are to be found special appropriations for the above schools; so that it is obvious there were in existence at the time of the Union, and have been ever since in this Province apart from schools established under the Parish School Act, denominational schools, recognised by the Legislature and aided from the public revenues.

But as it is not contended that the Common School Law prejudicially affects any right or privilege with respect to these schools which any class of persons had by law at the Union, it will be necessary to examine minutely and critically the Parish School Act of 1858, under which it is contended 'Rights and Privileges' existed which it is alleged have been so affected. By that Act, the Governor in Council, with a Superintendent appointed by the Governor and Council, constituted the Board of Education; the Province was to be divided into districts by the Governor and Council, who were to appoint an Inspector for each district; and to the Board of Education was confided the power of making regulations for the organization, government and discipline of the parish schools, and for the examination, classification, and mode of licensing teachers; to appoint examiners of teachers; to grant and cancel licenses, and to hear and determine all appeals from the

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decision of the trustees; to prescribe the duties of Inspectors of Schools; to apportion all moneys granted by the Legislature for the support of such schools, among the several parishes, in proportion, etc.; and to provide for the establishment, regulation and government of school libraries, and the selection of books to be used; but no books of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology, were to be admitted.

To the Superintendent was confided, subject to the order of the Board, the general supervision and direction of the Inspectors, and the enforcement and the giving effect to all the regulations made by the Board; he was to collect information on education; hold meetings in different parts of the Province, to which he was to invite the attendance of the Inspectors, teachers and inhabitants; to address such meetings on the subject of education, using all legitimate means to excite an interest therein; to cause trustees, school committees, and teachers to be furnished with copies of the regulations of the Board of Education, etc.; to adopt measures to promote the establishment of school libraries; to provide plans for the construction of school houses, etc.; with power to sue for books, etc., purchased for the use of parish schools, and for all moneys due on sale thereof; and he was required annually to prepare a report upon the conditions of the schools and school libraries, with information upon the system and state of education generally; the amount expended in promoting it; with suggestions, accompanied with a return of moneys received for the sale of books, etc., to be laid before the Legislature within ten days after the opening thereof.

Provision was then made that three trustees of schools should be annually elected in each town or parish, at the

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time and in the same manner as other town and parish officers; who should be subject to the same pains and penalties for neglect or refusal to act, or the non-performance of their duties, as other town and parish officers; and when any town or parish failed to elect, the Sessions should appoint as in other cases. In incorporated towns, cities or counties, the council were to appoint the trustees. The duties of the trustees were pointed out: they were to divide the parishes into convenient school districts; to give any licensed teacher authority in writing to open a school in a district where the inhabitants had provided a school house and secured salary, and with their assent to agree with such teacher; to suspend or displace teachers for incapacity, etc. They were required immediately after ratifying the engagement of a teacher, and annually thereafter, to call a meeting of the ratepayers of the district, for the purpose of electing a school committee of three persons; they were to accompany the Inspector in examination of schools; they were at least once a year to examine all schools; to authorize such number of schools in any town, etc., as the wants of the inhabitants might require; and if they deemed it necessary, authorize the employment of an assistant licensed teacher in any large school; to apportion among school districts any money raised by county or parish assessment for support, etc., of schools.

The election of a school committee by the ratepayers was then provided for, and their duties pointed out, viz., to have charge of school-house furniture, etc.; to call meetings of inhabitants for providing school-house, books, etc.; to have control of any library and appointment of a librarian, etc.; to receive and appropriate all money raised in the district for providing a library, etc.; to admit free scholars, and children at reduced rates, being children of poor and indigent parents, etc.

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The duties and qualifications of teachers are minutely detailed in section 8 (1).

Provision is then made for Provincial assistance for support of superior schools and libraries; and the subsequent sections of the Act provide for assessment whenever the majority of ratepayers in any county, parish, or district or municipality determine to provide for the support of schools therein by assessment, with a provision that any district school supported by assessment shall be free to all the children residing therein. As these latter sections do not touch the questions we are discussing, it is

(1) Section 8 is as follows :—

"8. The teachers, male and female, shall be divided into three classes, qualified as follows:

"Male teachers of the first class, to teach spelling, reading, writing, arithmetic, English grammar, geography, history, book-keeping, geometry, mensuration, land-surveying, navigation and algebra; of the second class, spelling, reading, writing, arithmetic, English grammar, geography, history and book-keeping; of the third class, spelling, reading, writing and arithmetic.

"Every teacher of the first and second class shall be qualified and enjoined to impart to his pupils a knowledge of the geography, history and resources of the Province of New Brunswick and of the adjoining North American Colonies.

"Female teachers of the first class to teach spelling, reading, writing, arithmetic, English grammar, geography, history, and common needlework; of the second class, spelling, reading, writing, arithmetic, English grammar, geography, and common needle-work; of the third class, spelling, reading, writing, arithmetic, and common needle-work.

"Every teacher shall keep a daily register of the scholars, which shall be open for inspection at all times; a visitor's book, and enter therein the visits of the Inspectors, Trustees and School Committees respectively; maintain proper order and discipline and carry out the regulations made for his guidance.

"Every teacher shall take diligent care and exert his best endeavours to impress upon the minds of the children committed to his care, the principles of Christianity, morality and justice, and a sacred regard to truth and honesty, love of their country, loyalty, humanity and a universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, order and cleanliness, and all other virtues which are the ornaments of human society; but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians; and the Board of Education shall, by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in parish schools; and the Bible when read in parish schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douay version, without note or comment."

unnecessary to refer to them more particularly. This Act was amended by the Act 26 Vict. c. 7, which, however, merely gives to the Board of Education authority to order a re-division of districts improperly divided, and to limit the number of teachers, etc.

This, then, was the state of the law relating to parish or common schools at the time of the passing of the B. N. A. Act, 1867, and continued so until repealed by "The Common Schools Act, 1871"; and because it is alleged that rights and privileges secured by or enjoyed under this Act have been prejudicially affected by the Common Schools Act, it is contended that the latter Act is void.

The Parish School Act clearly contemplated the establishment throughout the Province of public common schools for the benefit of the inhabitants of the Province generally; and it cannot, we think, be disputed, that the governing bodies under that Act were not, in any one respect or particular "denominational." The Board of Education was the Governor and Council, with a Superintendent appointed by them. The trustees were elected or appointed, as the case might be, as *other* parish officers, and they were put in other respects on precisely the same footing as other parish officers; and the school committee was elected by the ratepayers; and in nothing pertaining to the organization, regulation or government of the schools, had any class of persons or denomination whatever, as such, the slightest voice or right of interference —the Board of Education, on behalf of the inhabitants of the Province at large, being responsible for the general working of the system, and the trustees and school committees having the management and direction of certain matters, under the Board of Education, in the particular localities for which they were respectively elected, but without reference, so far as can be gathered from the statute, in any or either case to class or creed.

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The schools established under this Act were, then, public, parish or district schools not belonging to or under the control of any particular denomination; neither had any class of persons, nor any one denomination—whether Protestant or Catholic—any rights or privileges in the government or control of the schools, that did not belong to every other class or denomination, in fact, to every other inhabitant of the parish or district; neither had any one class of persons or denomination, nor any individual, any right or privilege to have any peculiar religious doctrines or tenets exclusively taught, or taught at all in any such school. What is there, then, in this Act to make a school established under it a denominational school, or to give it a denominational character?

A good deal has been said as to the intention of the Imperial Parliament in using the words "denominational schools," in sub-section 1. There seems to be no difficulty in giving a legal construction or definition to these words, if they are read in their ordinary sense. It is a well established canon of construction, that an Act is to be construed according to the ordinary and grammatical sense of its language, if precise and unambiguous; and it is likewise a rule established by the highest appellate authority, that "the language of a statute taken in its plain, ordinary sense, and not 'its policy' or supposed intention, is the safer guide in construing its enactments," *Philpott* v. *St. George's Hospital* (1). And in the great *Sussex Peerage Case* (2), the judges declared the law to be, that "if the words of the Act are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature."

The 5th paragraph of section 8 of the Parish School Act

(1) 6 H. L. Cas. 338; 3 Jur. N. S. 1269. (2) 11 C. & F. 85.

has been very strongly relied on, as establishing a right in respect to denominational schools. Under that paragraph, the teacher is most certainly enjoined to take diligent care, and exert his best endeavours to impress on the minds of the children committed to his care, *the principles of Christianity, morality, etc., etc.* As we think, it cannot be denied that the schools under this Act were to be public parish schools for the benefit of all the inhabitants of the parish or district in which they might be established, and the pupils attending the schools would necessarily, in a vast majority of cases throughout the Province, be children of parents belonging to different denominations; can it be supposed, with any reason, that the Legislature could have intended that the teacher, who might possibly himself belong to a persuasion differing from all his pupils, should impress on the minds of his pupils the principles of Christianity, by instructing each one in the peculiar doctrines of the denomination of its parents? Still less, do we think, it could have been intended that the principles of Christianity to be impressed, should be those of a denomination to which any of the pupils did not belong, simply because they might happen to be those of a denomination to which the teacher, or even a large majority of his pupils may have belonged.

It seems to us that, in view of the entire scope, object and policy of the Act, the duty imposed on the teacher by the 5th paragraph of section 8, was a duty outside of the educational teaching of the school (which is specifically provided for in paragraphs 1 and 2), to be performed as opportunities occurred by precept and example, rather than by any direct or continuous system of dogmatic teaching; that the principles of Christianity, honesty, etc., to be impressed, were to be principles of general applicability, interfering with the peculiar religious

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views of none; doctrines, precepts and practices which all Christian people hold in common, rather than the dogmatic teachings or tenets of a particular denomination or sect.

This view would seem to be strongly confirmed by the last clause of the 5th paragraph, because, while under the first clause of that paragraph, the duty referred to is to be discharged by the teacher in respect to all the children committed to his care, without any exception in favour of any class or creed; the provision in the last clause is, "but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians," leaving the duty still on the teacher "to impress on the minds of the children committed to his care, the general principles of Christianity, morality, justice, a sacred regard for truth and honesty," etc., etc.; and the paragraph ends by providing that the Board of Education shall, "by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in parish schools; and the Bible, when read in parish schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douay version, *without note or comment.*" This paragraph, so far from making the schools denominational, or giving any rights or privileges in respect to a denominational school, appears to us to be directly opposed to the idea of denominational teaching in the schools. Does not the very last clause (that most relied on at the argument), permitting the use of the Douay version, by the addition of the words "without note or comment," shew, that with the Bible read from that version, no denominational views of any kind shall be put forward; and is not the whole in this view entirely consistent with the exclusion from the school library, and from use, of all works on controversial theology?

But it has been said, that under the Parish School Act, schools were in fact established in certain localities where all, or a large majority of the ratepayers happened to belong to one particular persuasion, in which the catechisms of particular Churches were taught, prayers peculiar to a particular religious body were used, and books inculcating the doctrines, views and practices of a particular denomination were used as class books; and that these schools were therefore denominational, and consequently the class of persons belonging to any such denomination had a legal right or privilege with respect to denominational schools. Assuming what is alleged to have been the case —though on this point we have no information before us of which we can take judicial notice—surely it is begging the whole question. How can the mere fact, that, in exceptional cases, certain schools under the Parish School Act, drawing Provincial aid, may have been made for the time being, with or without the knowledge or sanction of the Board of Education, denominational, by reason of the teacher instructing the children exclusively in doctrines of a particular denomination, or using the prayers or books, or daily teaching the catechism peculiar to such denomination, confer any legal right or privilege on any class of persons with respect to denominational schools, or give the denomination whose tenets may have been so taught in any such schools, rights and privileges other than those possessed by all and every the humblest inhabitant of the parish in which such school existed, free and independent of all denominational connection?

It is not by what the Board of Education, Superintendent, Inspectors or Trustees may have done or allowed to be done under the Act, nor is it from the mode in which the principles of Christianity may have been actually practically taught in one or a hundred schools which may have drawn public money under the Public School Act,

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that the question in a legal view must be determined: we must look to the law as it was at the time of the Union, and by that, and that alone, be governed. Where then do we find any legal exclusive right or privilege conferred on any denomination to any school established, or that might be established under that Act; or any right or privilege conferred on any class of persons to deal with such a school as belonging to such persons as a class or denomination; or as being under their control as such; or that as a class they had any right to have taught therein the peculiar doctrines of their denomination?

The assumption that the character or status of the school could be legally altered or affected, or rights gained by reason of the religious opinions or feelings of the inhabitants of a district, or a majority of them, because in such a case trustees and a school committee might perchance be elected from a particular denomination, and so that then the school might be made denominational, is in our opinion entirely erroneous. To the Board of Education is entrusted the controlling, governing power. By those rules and regulations, made and ordained within the letter and spirit of the Act, must all acts under them be controlled and governed, wholly independent of the religious opinions of the electors of the district, or of the trustees elected by them. It appears to us, then, that in passing the Parish School Act, the Legislature contemplated a general system of education for the benefit of all the inhabitants of the Province, without reference to class or creed; that such schools were to be organized, regulated and governed by public bodies, not owing their existence to, or being in any way under the control of any class or denomination; that the Act made no provision for any schools established thereunder being denominational, and did not provide that any sect or denomination whatever, as such, was in any such schools to have control or prece-

dence, nor in any way give or recognise any right in any class of persons to have in the schools established thereunder, the doctrines, precepts or tenets of their denomination taught as part of the system of instruction, or to have such schools in any other respect denominational in their character; that with reference to religion, the Act simply recognised the duty of impressing on the minds of the pupils the general principles of Christianity, honesty, etc., common alike to all Christians; and simply required to be secured by regulation the reading of the Bible as the inspired Word of God, accepted by all Christians as the basis of their faith, securing always to the Roman Catholics the use, when read by Roman Catholic children, if required by their parents, the version recognised by their Church, but without note or comment; but at the same time, with the greatest apparent caution and scrupulous care, lest the religious principles of any should be interfered with, providing that even with respect to the inculcating of the principles of Christianity, morality, etc., as indicated, no pupil should be required to read or study in or from any religious book, or join in any act of devotion, objected to by his parents or guardians. And so, even with respect to the reading of the Bible, it is to be secured only to those children whose parents and guardians do not object.

If, then, the establishment of denominational schools, or the teaching of denominational doctrines, was not recognised or provided for by the Act, and the Roman Catholics had therefore no legal rights, as a class, to claim any control over, or to insist that the doctrines of their Church should be taught in all or any schools under the Parish School Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that as a class of persons, they have been prejudicially affected in any legal right or privilege with

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respect to "denominational schools," construing those words in the ordinary meaning, because, under "The Common Schools Act, 1871," it is provided that the schools shall be non-sectarian?

But it is contended in this case, that the words "denominational schools" were not used by the Legislature, and should not be construed by us, in their ordinary grammatical sense and meaning, but should have a much broader interpretation. While freely admitting that, though the general rule is that every word must be understood according to its legal meaning, in construing an ordinary, as opposed to a penal enactment, where the context shews that the Legislature has used it in a popular or more enlarged sense, Courts will so construe the language used; we are at a loss to discover anything in the B. N. A. Act, 1867, indicating a legislative intention of using the words otherwise than in their ordinary meaning. It is clear enough that the reference in sub-section 2 to separate and dissentient schools in Ontario and Quebec, is especially to schools of Protestants and Catholics; and it is, perhaps, equally clear that sub-section 3 applies only to schools of a like character existing in any of the four Provinces. But we are at a loss to understand why sub-sections 2 and 3 should be held to control or in any way limit or affect a previous distinct enactment, couched in plain and unambiguous language, and which, by quite as clear and unequivocal terms, has relation to all classes of persons or denominations, and to all the Provinces of the Dominion; or why, because separate and dissentient schools, as between Protestants and Roman Catholics, not only in Ontario and Quebec, but in any Province in which they may exist at the Union, or be thereafter established, are provided for and protected, therefore we must necessarily infer therefrom that in using the term "denominational schools" in sub-

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section 1, the Legislature intended to legislate only as between Roman Catholics and Protestants, and then also as to schools not necessarily denominational in the ordinary acceptation of the term.

We think that the term "denomination" or "denominational," as generally used, is in its popular sense more frequently applied to the different denominations of Protestants, than to the Church of Rome; and that the most reasonable inference is, that sub-section 1 was intended to mean just what it expresses, viz. that "any," that is, every "class of persons" having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of Protestants, or Roman Catholics, should be protected in such rights. If it had been intended that the clause was to be limited in its application to Roman Catholics and Protestants, only as dissentient one from the other, and apply to schools other than those usually understood as denominational schools, is it not fair to presume that the Legislature would have used some expression in the sub-section itself indicating such a particular sense, especially as we have seen there were at the Union, in this Province at any rate, strictly denominational schools, both Protestant and Roman Catholic, to which such a clause would be applicable; and for the very reason also, that when dealing with schools as between Protestant and Roman Catholic in sub-sections 2 and 3, the language clearly confines it to those bodies respectively?

But, assuming that the term "denominational schools" is not to be construed in what has been called its narrow signification, perhaps the most favourable position to assume would be, to read the sub-section 1 as meaning substantially that nothing in any such law shall prejudicially affect any right or privilege which any class of

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persons, as a denomination, had by law with respect to schools in the Province at the Union. Let us endeavour to ascertain whether in such a case we would be justified in pronouncing the Common Schools Act, 1871, *ultra vires*, and therefore void.

Except in the matter of compulsory taxation, there is no very great difference in principle, that we can discover, between the Parish School Act of 1858 and the Common Schools Act of 1871. The general government, superintendence and control of the schools are, under both laws, vested in a Board of Education almost similarly composed, the only difference being that, to the Governor and Council and Superintendent, is added the President of the University under the latter Act; in fact, the power to make regulations for the organization, government and discipline of the schools, appointment of examiners of teachers, and the power of granting or cancelling licenses, and of making such regulations as may be necessary to carry into effect the Act, and generally to provide for any exigencies that may arise under its operation, are precisely the same in both —(See sec. 4, paragraphs 3 to 10, of the Parish School Act, and sec. 6, sub-sections 4 to 8, of the Common Schools Act): and the details are to be carried out by a Superintendent, Inspectors and Trustees, alike substantially under both Acts; and the duties and powers of these officers do not in principle substantially differ.

But there are, of course, differences. Those relied on are that the Common Schools Act has no enactment similar to section 8 of the Parish School Act; that the Parish School Act had no enactment similar to section 58, subsection 12, of the Common Schools Act; and this section, it is alleged, prohibits the granting Provincial aid to any but schools under the Common Schools Act; and that by the 60th section of the Common Schools Act, all schools

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conducted under its provisions shall be non-sectarian—a provision not to be found in the Parish School Act; and it is contended, that the omission in the one case, and the express enactment in the other, prejudicially affect the rights and privileges which the Roman Catholics, as a class of persons and a denomination, had in the schools established or which might have been established under the Parish School Act; in other words, that the rights and privileges which they had under the one, the omission and the enactments referred to prevented their claiming or obtaining under the other.

With reference to the omission: the Parish School Act no doubt declares that the Board of Education shall secure to all children, whose parents do not object, the reading of the Bible, and that when read by Roman Catholic children, if required by their parents, it shall be in the Douay version, without note or comment. Here we have expressly directed to be secured to all children, what many persons no doubt consider a great right and privilege; and Roman Catholic parents have a great right secured to them, viz., to have, if they require it, a particular version of the Bible read.

As to the reason why a similar provision, securing these important rights, in which Protestants and Catholics were both interested, was excluded from the Common Schools Act, it is not our business to enquire; what we have to determine is, does this omission make the law void, if in other respects unobjectionable? We think not. If this was a right or privilege which existed at the Union, the Legislature certainly have not protected it by any express enactment. But is the right taken away? May it not still exist, provided always it is a right which legitimately comes under sub-section 1, section 93? Because that section declares that nothing in any such law shall prejudicially affect any such right; and in such case,

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reading the Common School Law by the light of this section, would it not be the duty of the Board of Education under the Common Schools Act, instead of making regulation 21, declaring as follows:—that "it shall be the privilege of every teacher to open and close the daily exercises of the school by reading a portion of Scripture (out of the common or Douay version, as he may prefer) and by offering the Lord's Prayer—any other prayer may be used by permission of the Board of Trustees: but no teacher may compel any pupil to be present at those exercises, against the wishes of his parents or guardian, expressed in writing, to the Board of Trustees;" to secure by regulation, just what the Board of Education were bound to secure under the Parish School Act of 1858; that is, to make just such a regulation as the Parish School Act required to be made? We have seen they have precisely the same, and only the same powers to make regulations, as the Board had under the Parish School Act. By this simple means, the rights of all the children and their parents in the Province—as well Protestants as Roman Catholics—which existed at the Union, would be preserved, and all just cause of complaint on this head removed. Why the Board of Education should have departed from the principle and policy of the Parish School Act, and taken from the parents of all the children of the country—Protestant and Roman Catholic alike—the great boon and privilege of insisting on the Bible being read in schools, as they have done, and should have conferred on the teacher not only the privilege of reading the Bible or not as he likes, but out of the common or Douay version—not as the children or their parents may choose, but as the teacher may prefer, though he cannot compel the attendance of the pupils,—is not for us to attempt to explain we simply point out the fact. But if the right secu-

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by the Parish School Act is protected by the B. N. A. Act, 1867, we fail to see, because the Board of Education may not have made such a regulation as they ought in such case to have made, or have made a regulation they ought not to have made, that the action of the Board, or its non-action, can render the Act of the Legislature inoperative.

If the right and privilege fall under section 93, and if there is no power to compel the Board of Education to make such a regulation, or the Legislature should have inserted a clause in the Common Schools Act, requiring them to do it, is not this just a case where sub-section 4 of section 93 of the B. N. A. Act, 1867, applies? viz.:—"In case any such Provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made . . . . then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section."

In this connection we may refer also to the 20th regulation, which, it has been contended, prejudicially affects the rights and privileges which the Roman Catholics had under the Parish School Act. This regulation declares that "symbols or emblems distinctive of any national or other society, political party, or religious organization shall not be exhibited or employed in the school-room, either in its general arrangement or exercises, or on the person of any teacher or pupil." It may be, that the Board of Education have disregarded the general policy of the Common Schools Act, and interfered with the rights of teachers, parents and children, in excluding from the schools alike teachers and pupils who may exhibit on their persons, in dress or ornament, symbols or emblems distinctive of any national

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or other society, political party, or religious organization: for, however clear the right of the Board of Education may be to make regulations necessary for the good government and discipline of the schools, to make arbitrary restrictive regulations as to the dress or personal adornment of the teachers and pupils, or which are calculated unnecessarily to interfere with the feelings, national, social or religious, in matters not calculated to give any just cause of offence to others, or to interfere with good order in the schools, is quite another question. And while it is by no means clear to us, that any power exists in the Board of Education, under the Common Schools Act, by regulation, to deprive teachers, parents and children, of their right of access to the free schools of the country, to the support of which they and all others are forced to contribute, unless they submit to such regulations; and though the assumption of such a power of practical expulsion by the Board of Education raises a question involving important and delicate rights,—rights which, in this land of civil and religious freedom, few may be willing to see infringed—or at any rate, raising discussions which must be unpleasant to those engaged in them, and calculated to result in consequences which can scarcely fail to produce acrimonious feelings, and in the end be injurious to the cause of free education, which we must presume the regulation objected to was intended to further; all we can say is, as the case stands, the regulations are not before us in such a way that we can deal with them, and therefore we are not called upon to express any decided opinion as to their validity, because the constitutionality of the Act cannot, in our opinion, be affected by any regulation made under it, their being nothing unconstitutional in the Act itself, that we can discover.

The second objection is easily answered. The provision

in sect. 58, sub-sec. 12, of the Common Schools Act, declaring that no public funds shall be granted, would seem to apply to the schools particularly referred to in the preceding part of that section, and not to all schools. But, if it was intended to apply generally to all schools as Mr. *Duff's* argument assumes, what does it amount to? It cannot take from the Legislature the right to make such grants. Thus we see in the Estimates of the year 1872, grants were recommended by the Lieutenant-Governor, and no doubt made, for all the denominational schools before specially referred to (see Journals of House of Assembly, page 124); and if such a clause was *ultra vires*, and we declared it void—*cui bono?* It would not affect the other parts of the Act, and what would practically be attained? The Legislature could, whether the clause stands or is declared void, do just as it pleases about granting or withholding the public funds.

But it is contended that the 60th section, declaring "that all schools conducted under the provisions of this Act shall be non-sectarian," prejudicially affects the rights and privileges which the Roman Catholics, as a class, had in the parish schools at the time of the Union. It cannot be denied that to the Provincial Legislatures is confided the exclusive right of making laws in relation to education; and that they, and they only, have the right to establish a general system of education, applicable to the whole Province, and all classes and denominations, provided always they have due regard to the rights and privileges protected by section 93 of the B. N. A. Act, 1867. Now what, in this case, is the right or privilege claimed to have been prejudicially affected? Is it a legal right or privilege that could have been put forward and enforced by the Roman Catholics, as a class, under all circumstances and in every parish or common school; or is it a legal right confined to the Roman Catholics as a body; or

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does it belong equally to all and every of the other denominations of Christians in this Province, and capable by them of enforcement; or, on the contrary, was it not the mere possible chance of having religious denominational teaching in certain schools, dependent entirely on accidental circumstances; as, on what might happen to be the religious views of the majority in a parish, and then on the accidental result of the election of trustees and school committee, and on the views of the parties so elected, as to religious denominational teaching, and their willingness to permit it in the schools (admitting that the trustees or committee had any discretion in the matter, which perhaps is more than doubtful); was it not also dependent on the Board of Education, who had the general controlling power? If dependent on circumstances such as these, how can it be considered such a legal right as could have been contemplated by the Imperial Parliament in passing the 93rd section of the B. N. A. Act, 1867? Where is there anything that can, with any propriety, be termed a legal right? Surely the Legislature must have intended to deal with legal rights and privileges. How is it to be defined—how enforced?

It by no means follows as a necessary legal consequence, that because a majority of the inhabitants of a parish or school district may belong to a particular persuasion, they would necessarily vote for trustees favourable to denominational teaching, nor could they be compelled by any legal process so to vote; nor does it follow that trustees when elected even by a majority of one denomination, would necessarily prove favourable to denominational teaching; and by what legal process could they be constrained to assent to its introduction in the schools?

And again, suppose up to this point all were favourable, might not the whole scheme be ignored by the Board of Education; and how then could any class of persons, as

such, no matter to what denomination they may belong, claim of right to control or direct the acts or doings of any of these parties; or how could electors, trustees, school committees, or the Board of Education, be compelled to make any school in any sense denominational, or in other words, to confer on any such class denominational rights? Surely the rights contemplated must have been legal rights; in other words, rights secured by law, or which they had under the law at the time of the Union. If any such existed, they must have been capable of being clearly and legally defined, and there must have existed legal means for their enforcement, or legal remedies for their infringement. for it is a clear maxim of law, that *ubi jus, ibi remedium.* It was said long ago in a celebrated case, that if a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is aggrieved in the exercise and enjoyment of it; and that it was indeed a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. What possible legal means could any denomination have invoked under the old Parish School Act, to compel any one school to be made denominational, or to require and insist that in any one school denominational tenets, doctrines, precepts or practices, should be taught or used? But then it was repeatedly urged upon us, that under the Parish School Act, circumstances might, and very often did, concur, where schools might, and in numerous cases did, become denominational; but that by reason of section 60 of the Common Schools Act, such was not now possible. The answer is simply this: The inability of a class of persons to have under the Common Schools Act, that which possibly they might, under certain exceptional and accidental circumstances have had under the Parish School Act of 1858, but which they had no right to insist on having, is a damage not

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occasioned by anything which the law esteems an injury, a kind of damage termed in law, *damnum abeque injuria*, and for which there is no remedy. And so, in this case, as there was no legal right to have denominational schools or denominational teaching, there is no injury in legal contemplation committed by the Legislature dealing with the question in such a manner as to prevent the possibility arising, and consequently no right to have the action of the Legislature abrogated. It may be a very great hardship, that a large class of persons should be forced to contribute to the support of schools to which they are conscientiously opposed, or be shut out from what they have hitherto, under certain circumstances, enjoyed, and be without remedy; but by any such considerations Courts of Justice ought not to be influenced; hard cases, it has been repeatedly said, are apt to make bad law: and it also has been justly remarked, that if there is a general hardship affecting a general class of cases or persons, it is a consideration for the Legislature, not for a Court of Justice.

FISHER, J.:—

I concur in the judgment of my brethren, as to the constitutionality of the Common Schools Act, 1871, but as there are some sentiments in it in which I do not agree, I have thought in a matter of so much delicacy and importance, it was better to read the judgment that I had written, than attempt to qualify opinions which my brethren had so fully considered.

The right to impose this assessment is objected to on the ground that it includes a sum for the support of schools under the authority of the Act relating to Common Schools, 34 Vict. c. 21, which it is contended is unconstitutional; that the Legislature have no power to pass it, because it contravenes the exception in the Act of the Union.

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The exclusive power of legislating upon the subject of education is, by the 93rd section of that Act, conferred upon the Legislature of each Province subject to the reservation of the rights of any class of persons with respect to denominational schools.

Every one acquainted with the history of the Provinces which comprised Canada before the Union knows the reason for the insertion of some of the provisions of this section. It was found to be the only mode of solving a question that had caused serious difficulty with the Government and Legislature of that Province.

Paragraphs two and three were constructed to soothe and settle these difficulties, and at present only apply to that Province, now consisting of Ontario and Quebec, where schools were in operation at the Union, answering the description given them in these paragraphs.

Whether the fourth paragraph applies to any other law than such as is referred to in the third paragraph, it is not necessary to consider, as the constitutionality of the School Act depends entirely upon the meaning of the first paragraph.

The simple question for solution is, does the Common Schools Act, 1871, prejudicially affect any right or privilege with respect to denominational schools, which any class of persons had by law in the Province at the time of the Union? It is not merely a right or privilege. A denominational right or privilege, of itself, if any such existed, would not alone make the Common Schools Act unconstitutional. It must be a right or privilege with respect to a denominational school, which a class of persons had by law at the Union, which is prejudicially affected by this Act, to render it unconstitutional.

It appears to me, that the first enquiry is—What is a denominational school? In my opinion, it is a school under the exclusive government of some one denomina-

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tion of Christians, and where the tenets of that denomination are taught. But assume that a school answering either of these requisites is a denominational school, and this is the lowest ground upon which it can be put, and then examine the laws in force at the time of the Union, to ascertain if any such school then existed by law, and if the right of any class of persons therein has been prejudicially affected by the Common Schools Act. There were denominational schools at the Union, such as the Varley School in St. John, the Sackville Academy, the Madras School, and the like, but they are not touched by the Common Schools Act, 1871; they remain in the enjoyment of all the rights they had at the Union. The Act 20 Vict. c. 9, intituled "An Act relating to Parish Schools," with some unimportant amendments not affecting the present question, was in force at the Union. As it has been superseded by the Common Schools Act, 1871, which is objected to, we must refer to its provisions to ascertain whether it authorized any denominational school; for if it did not, then the Act under consideration has not in any of its provisions prejudicially affected any right or privilege any class of persons enjoyed at the Union. The very title of the Act proclaims its unsectarian character as fully, to my mind, as the positive enactment of the Act of 1871, that the schools conducted under its provisions should be non-sectarian—a useless provision in an Act which alone provided for the establishment of such schools. Parish schools, that is, schools in and for every parish in the Province, according to the political division of the Province into counties, towns, and parishes, distributed and sustained by public aid according to the population and extent of each parish,—the number and classes of the schools must, in the very nature of things, be other than denominational.

I will now refer to the provisions of the Act, and see if there is any authority for the establishment of a denominational school under it, or any countenance in the Act for such a school. The Governor in Council appoints the Superintendent of Schools, who, with the Governor and three members of the Executive Council, constitute the Board of Education. The inspection of the schools is done altogether by political agency. The Governor in Council is authorized to divide the Province into four districts, and appoint one Inspector for each district. The Board of Education, a purely political body, makes rules and regulations for the organization and government of the schools, and such other regulations as may be deemed necessary to carry the Act into effect. There was no restriction whatever upon the power of the Board in this respect. The Board regulates the mode of licensing, examining, classifying, and paying the teachers, and prescribes the duties of the Inspectors. The Superintendent, a political officer, has the general direction and supervision of the schools, subject to the order of the Board. Each parish was to be divided into school districts by three trustees annually elected by the ratepayers, at the same time and in the same manner as other town or parish officers were elected, and subject to the same penalties and disabilities, with the same provision for appointing them, in case of failure in the election. They employ the teachers, and may dismiss them, subject to an appeal to the Board of Education. They are to examine the schools, and apportion the money raised by assessment, when so raised, amongst the different schools. Each school was under the immediate supervision of a school committee elected annually by the ratepayers of the district. They were empowered to admit free scholars, and children of poor parents at a reduced rate. The law also provided for a superior

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school in each parish, thus also supplying the means for higher education. The teachers, both male and female, were divided into three classes, with an appropriate allowance to each class from the Provincial Treasury, and with duties, as to the subjects taught, prescribed in the Act for each class. It provided for a school library in each district, by a money grant in aid of the amount raised in the locality for that purpose, and placed the selection of books under the control of the Board of Education; but expressly excluded works of a licentious vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology. This is the only part of the law in which anything of a denominational character is referred to in any way; and it shews how jealous the Legislature was in guarding the law, and in preserving the schools from any denominational or sectarian tendency. Provision was made for the education of the children of the whole people, in schools of every grade, and by teachers of both sexes; and by the superior school, the wants of higher education were provided. The whole machinery of the Act is designed to make the schools common to the child of every man, irrespective of his religious opinions. The Act recognises the agreement of the inhabitants of any locality with a teacher licensed by the Board of Education, when they have provided a sufficient school-house and secured the necessary salary, raised by voluntary contribution or tuition fees. It contains provision for voluntary assessment in the district, parish or county where the ratepayers determine to adopt that mode of supporting the schools; and in such case the schools are declared to be free to the children of all the inhabitants. The system is prescribed by the Board of Education; the localities take an active part in the establishment and government of the schools, subject to the general control of the Gov-

ernment. The local agency is exercised, and the local officers appointed, in the same manner as for the government and support of the poor, the highways, or any other local or parochial object. Neither class, creed, nor colour affect or influence the one more than the other. The only qualification for the electors of any officer is that they are to be ratepayers upon real or personal property or income. No class or creed had, under the Act, any peculiar right, either in the general government of the whole Province, or in any parish or school.

Now, when all this machinery for working the Act relating to Parish Schools had been made, is it not a striking proof of the determination of the Legislature to avoid the very thing which it is contended the Act authorizes; by restricting the power of the Board of Education to make rules and regulations in this respect, and expressly excluding from the school libraries works hostile to the Christian religion, or works on controversial theology; while it left the inhabitants free to elect their local agents, who should employ their teachers and look after the schools. To secure to every man, and the child of every man, a just equality with regard to his religious faith, it enacted, in effect, that the great leading principles of Christianity should be inculcated in the schools; but there should not be in the library a book upon controversial theology, or, in other words, with denominational teaching. What sort of denominational school would that be where the master would not be aided in his dogmatic teaching by the writings of men of his own faith? When a denominational school is established, how strictly this is provided for. Take any one of the Acts on our statute book, and examine its provisions. I will refer to the Act incorporating the trustees of the Wesleyan Academy at Mount Allison, Sackville (12 Vict. c. 65). The 11th section is as follows:—"No person shall teach, maintain, promulgate

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or enforce any religious doctrine or practice in the said Academy, or any other department thereof, or in any religious services held upon the said premises, contrary to what is contained in certain Notes of the New Testament, commonly reported to be the Notes of the said Rev. John Wesley, A.M., and in the first four volumes of Sermons, commonly reported to have been written and published by him." Take the charter of the Madras School, or any other Act, and the same strict provision for dogmatic teaching is made. I pass by the Colleges, which were referred to by the counsel on the argument on this rule, as not material to the enquiry, if they are within the category contended for. I can hardly imagine any stronger illustration of the principle that pervades the whole Act relating to Parish Schools, than the language of the eighth paragraph of the fourth section, which thus restrains the legislative power of the Board of Education. It is as follows:—"To provide for the establishment, regulation, and government of school libraries, and the selection of books to be used therein; but no works of a licentious, vicious, or immoral tendency, or hostile to the Christian religion, or works on controversial theology, shall be admitted."

It has been urged that the sixth paragraph of section 8 countenanced denominational teaching. I think no one can read that section, and fail to discern that it enacts the very contrary. The words of the paragraph are:—"Every teacher shall take diligent care, and exert his best endeavours to impress on the minds of the children committed to his care the principles of Christianity, morality, and justice, and a sacred regard to truth and honesty, love of their country, loyalty humanity, and a universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, order and cleanliness, and all other virtues which are the

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ornaments of human society." Surely it cannot be disputed that this can be done without any denominational teaching, or, in the language of the statute, without entering upon contraversial theology. There are certain great fundamental principles of Christianity, common to all, that may be enforced, without trenching upon debatable ground. Take the Sermon on the Mount, or any of the lessons of the Great Teacher himself, for example. To avoid any abuse of this duty or privilege of the teacher in the parish school, the Legislature proceeds further to enact—"but no pupil shall be required to read or study in or from any religious book, or join in any act of devotion objected to by his parents or guardians." Here is a positive enactment against denominational teaching. Knowing it to be possible for a designing teacher, under colour of the authority to impress upon the minds of the children the principles of Christianity, and all other virtues, stealthily to teach doctrines of a denominational or sectarian character, and to protect the child from the influence of such teaching, the parents are empowered to interfere and withdraw the child from any such teaching, or from joining in any act of devotion having such a tendency.

The paragraph then proceeds thus—"and the Board of Education shall, by regulation, secure to all children whose parents or guardians do not object to it, the reading of the Bible in parish schools." What is there denominational in thus inculcating the principles of Christianity, and all other virtues, which are the ornaments of human society? What better mode could be adopted than by reading portions of the Bible? It certainly is not a denominational book. It is the common standard of faith and practice to all Christians. To it they all appeal. Where are such ennobling thoughts as in the Bible? It is said to be an historical

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fact that when the question of reading the Bible in the common schools of one of the cities on this continent was debated, the Jews voted for it, on the ground that it was well adapted to the instruction of children, because of the sublime principles of morality it contained.

Though the Bible is regarded as the great charter of our salvation, as the revelation of the will of God to man, eminent divines in one branch of the Church Catholic object that some words, some expressions, some sentences are incorrectly rendered in our ordinary English version, and recognise another version as being a more correct interpretation of such words, expressions, and sentences. The Legislature, with the same object of preventing any denominational right, enacts—"and the Bible, when read in parish schools by Roman Catholic children, shall, if required by their parents or guardians, be the Douay version, without note or comment;" the very words "without note or comment," of themselves, are significant proofs of the intention of the Legislature.

Assuming that the Bible is a denominational book, and I cannot think any one will seriously contend that it is, and that this provision created a right—a denominational right, if you please—that will not help the *ultra vires* argument; because if it were so, it is a right or privilege which a class of persons had by law at the Union, to have the Bible read in a parish school, not in a denominational school, and that is not a right secured by the B. N. A. Act, 1867, even if it existed. I have endeavoured to ascertain the true construction of the Act relating to Parish Schools, as the only Act affecting the question; I include the amendments, which are not important. Every other Act which confers upon any denomination a right or privilege with respect to denominational schools, is left unrepealed, so that no right or privilege enjoyed by any class of persons under any such Act is

prejudicially or in any way affected by the Act under consideration.

I will now refer very briefly to the 34 Vict. c. 21, intituled "An Act relating to Common Schools." It is substantially the same as the Act of 1858, relating to Parish Schools. The Board of Education is the same, with the addition of the President of the University. It has the same large powers. The duties of the Superintendent are the same. The number of Inspectors is increased, with smaller districts for each, but with duties very similar to what they discharged under the old law. The trustees are appointed in the same manner as under the old law, and discharge much the same duties, including the duties of the school committee. The teachers are classified and paid as in the old law. Superior schools are provided for, and libraries, upon the same principle. The only difference that I can discover arises from the different modes of supporting the school. Under the Act of 1871, the portion of the support furnished by the inhabitants is raised by assessment; and in the machinery and provision necessary for working this out, and the different modes of paying and supporting the schools, that it involves, is the only difference. In other respects this Act provides for the attainment of the same object by the same means. It is said that there is no provision requiring the reading of the Bible in the schools. The Board of Education may by regulation provide for it, as in the Act relating to Parish Schools. If it were otherwise, it would not help the *ultra vires* argument, unless the schools could be shewn to be denominational.

Upon the argument it was contended that some of the regulations interferred with the rights of a class of persons. I confess I was unable to discover the bearing of that argument upon the question. How, if the law

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were good, a bad regulation—if such there was—would affect it? Assume that this contention is correct, and that it prejudicially affects the right that a class of persons had at the Union, such a right, if it existed, is not saved by the B. N. A. Act, 1867; because it would be a right or privilege with respect to a parish school, and not to a denominational school. I cannot discover that the regulations have anything to do with the question of the power of the Legislature to pass the Act, or can form any guide in the interpretation of it. It appears to me that under either of the Acts of 1858 or 1871, it was competent for the Board of Education to make any of the regulations referred to; whether they exercised their powers wisely or unwisely, under the Act of 1871, is another question. The propriety of the regulations objected to is a question of public policy, upon which I am not called upon to express an opinion. I may, as an individual, entertain a very strong opinion as to its policy. As a judge, all I feel called upon to do is to consider its legality, and for myself on that point, I entertain no doubt. I am therefore of opinion that the Rule should be discharged.

WETMORE, J.:—

While fully concurring in the opinion of my learned brethren as to the constitutionality of the Common Schools Act, 1871, I do not wish to be understood as expressing a participation in any doubt whatever as to the regulations of the Board of Education. I think the only question properly before the Court is as to the Act itself, and not as to the regulations. We are only called upon to decide whether or no, the Schools Act, or any part of it, is *ultra vires;* and upon the decision, the assessments, to set which aside the applica-

tion is made, are to be affected. If the Act itself is not *ultra vires*, I do not see how the promulgation of any regulation, even supposing it to be one which the Schools Act would not warrant, or to be in violation of the provisions of section 93, sub-section 1, of the B. N. A. Act, 1867, can affect the case any more than assessors acting in violation of the law under which an assessment is imposed, would affect the law authorizing the asessment. In such case, if the assessment is imposed in a manner not warranted by law, parties aggrieved would have their remedy for obtaining relief; and so, with reference to a regulation sought to be established by the Board of Education. If that body should exceed the power given by law in such case, the regulation would not have the support of law to uphold it, and therefore could not be maintained; but the law, nevertheless, would remain in full force and authority. The application to this Court is simply to set aside an assessment in consequence of the invalidity of the law; it does not touch the regulations; and though they have been referred to by counsel in the argument, it does not seem to me they are before us in such a way as to call for a decision, or the expression of an opinion upon any one of them. Indeed, I do not see that a most positive and direct expression by the Court, as to the legality or illegality of any of the regulations, would in the slightest degree affect the constitutionality or unconstitutionality of the law; and I therefore purposely abstain from expressing my opinion upon any one of the regulations. Should a question arise respecting the regulations, or should a decision upon them be necessary for any other matters before the Court, then, of course, I would be required to express my opinion; until it does arise, I decline doing so: to use an expression of Cockburn, C. J.,

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in *Rimini* v. *Van Praagh* (1)—"It will be time enough to do so, when the necessity arises."

Rule for a Certiorari discharged. (2)

(1) L. R. 8 Q. B., p. 4.

(2) [The following note of the judgment of the Privy Council as to the New Brunswick School Law is taken from the *Times* of July 18, 1874. The judgment is not given in the regular reports.]

MAHER *v.* THE TOWN OF PORTLAND.

This was an appeal from the Supreme Court of New Brunswick, in reference to the education question, and involved, it was stated, an important question as to the Roman Catholic inhabitants, under the Common Schools Act, 1871.

Mr. *Joseph Brown*, Q.C., and Mr. *Duff*, Q.C. (of the Canadian Bar), were for the appellant; Sir *John Karslake*, Q.C., Mr. *Cowie*, Q.C., and Mr. *King*, Q.C. (the Attorney-General for New Brunswick), for the respondents.

The appellant, one of the Roman Catholics of New Brunswick, was assessed in 1872 under the Common Schools Act. The assessment was made by the assessors of taxes for the town of Portland. The warrant was issued by the Town Council, in pursuance of a requisition of the Board of School Trustees. The appellant felt aggrieved, as a Roman Catholic, and applied to the Supreme Court for a rule *nisi*, calling on the Town Council to shew cause why a writ of *certiorari* should not be issued to bring the order of assessment into Court, with the view of its being quashed. It was alleged that the Common Schools Act, under which the assessment was made, was void, as having been passed in contravention of the B. N. A. Act, 1867, the 93rd section of which provided that in each Province the Legislature might exclusively make laws in relation to education, according to the provisions set forth, one of which was that nothing in any such law should prejudicially affect any right or privilege with respect to denominational schools, which any class of persons had by law in the Province at the Union.

Mr. *Brown* and Mr. *Duff* were heard in support of the appeal, and a discussion arose on "denominational schools" in New Brunswick.

Lord Justice James, after conferring with the other members of the Committee, *gave judgment without calling on the respondents. Their Lordships concurred in the opinions of the Court below, and would advise Her Majesty that the appeal be dismissed with costs.

*Present:—SIR JAMES COLVILLE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, SIR MONTAGUE SMITH, and SIR ROBERT P. COLLIER.

NEW BRUNSWICK SUPREME COURT.

McALMON *v.* PINE. 1874

[*Reported 2 Pugsley, 44.*]

Insolvency—Gaol limits, power to alter—30 Vict. c. 28 ; 31 Vict. c. 29, N. B.

The Legislature of New Brunswick prior to the Union passed an Act extending the gaol limits. This Act was not to come into operation until April 1, 1868, and before that date but after the Union it was repealed by a subsequent enactment :

Held, that the subject of gaol limits does not so relate to insolvency as to make the repealing Act *ultra vires*.

Appeal from the Kent County Court.

The defendant, P., having been arrested at the suit of the plaintiff, entered into a limit bond with sureties; the condition of the bond being that P. would not leave the "limits of the gaol of Kent County." By an Act of the Legislature of New Brunswick, 30 Vict. c. 28, the gaol limits were made to extend over the whole county. This Act was not to come into operation until the first day of April, A. . 1868, and before that period it was repealed by Act 31 Vict. c. 29. P., having gone beyond three miles from the gaol, which were the limits previous to the passing of the Act 30 Vict., the present action was brought on the bond. It was contended on the part of the defendants that the Legislature of New Brunswick had no power to pass the latter Act, as it related to insolvency and was *ultra vires* of the Local Legislature, being passed since the B. N. A. Act.

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McALMON v. PINE.

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The County Court Judge having decided against the defendants, they now appealed to this Court.

Mr. *Needham*, Q.C., for the appeal.

Mr. *E. L. Wetmore*, contra, was not called on.

Per CURIAM: We do not think there is anything in this point.

Appeal dismissed with costs.

NEW BRUNSWICK SUPREME COURT.

REGINA *v.* MCMILLAN ET AL. 1874

[*Reported 2 Pugsley, 110.*]

Licenses, power to make laws respecting—33 Vict. c. 23, N. B.

Provincial Legislatures can impose fines and penalties for selling liquor without license.

A rule *nisi* for a certiorari to quash a conviction of one *Sarah McCloskey* for selling spirituous liquors without a license having been obtained.

Mr. *Rainsford* shewed cause.

Mr. *E. L. Wetmore* supported the rule.

The judgment of the Court was delivered by

ALLEN, J.:—

This was an application to quash a conviction of *Sarah McCloskey* for selling spirituous liquors without a license, before the defendants, two Justices of the Peace for the County of Northumberland.

One of the objections taken to the conviction was, that the Act 33 Vict. c. 23, under which the proceedings were taken, was *ultra vires*, and consequently that the Justices acted without jurisdiction.

The first section of this Act repeals the fourth section of the 17 Vict. c. 15, which authorized the General Sessions to grant tavern licenses to persons residing in remote situations, for the sum of £2. Section two declares that notwithstanding anything contained in the

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Act 17 Vict. c. 15, no license shall be granted in any parish in this Province, when two-thirds of the resident ratepayers in such parish shall petition the Sessions against issuing any licenses. This section was repealed by the Act 34 Vict. c. 6, which prohibits the granting of licenses when a majority of the resident ratepayers in a parish petition against it.

As to the constitutionality of these sections it is sufficient to say, that there was no evidence of any petition to the Sessions of Northumberland against granting licenses, nor of any application by Mrs. *McCloskey* to the Sessions for a license, or any refusal by them to grant her a license. No question, therefore, arises in this case as to the validity of those sections of the Act. (1)

As to the third section of the Act, which imposes the penalties for selling liquor without license, and provides the mode of recovery, we are not satisfied that it is *ultra vires*. By the B. N. A. Act, 1867, sec. 92, sub-sec. 9, the Local Legislature is authorized to make laws (*inter alia*) relating to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes," and by sub-sec. 15 it is authorized to legislate for the "imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

The Local Legislature, then, have the clear right to make laws respecting tavern licenses, and to impose fines, penalties, etc., for enforcing such laws.

It has been contended, however, that by directing the manner in which such fines are to be recovered, the pro-

(1) [See Keefe v. McLennan, *ante*, p. 400.]

visions of the B. N. A. Act, 1867, s. 91, sub-s. 27, giving to the Parliament of Canada the exclusive power to legislate upon the "Procedure in criminal matters," is invaded—the imposition of fines and imprisonment being a proceeding in a criminal matter. See *Atty.-Gen.* v. *Radloff* (1); *Cattell* v. *Ireson* (2); *Parker* v. *Green* (3).

It may be questionable whether the Local Legislature have exceeded their powers by this section (4), as they clearly have the right to establish Provincial Courts both of civil and criminal jurisdiction (sub-sec. 14).

But if they have exceeded their powers, the excess only—that is, the mode pointed out for the recovery of the fines—would be void; and then no mode of proceeding for the recovery of the fines would be prescribed by the Act, and in such case the provision of the 1 Rev. Stat., c. 161, sec. 32, would apply. That section provides that where no particular mode is prescribed for the recovery of penalties, they may be recovered with costs before a Justice of the Peace, where the penalty does not exceed £10, and before two Justices where it does not exceed £20, under the chapter relating to summary convictions before Justices out of Sessions. The conviction in this case would therefore be good, either under this Act, 33 Vict. c. 23, or under the Revised Statutes. Consequently there is no objection to the conviction on this ground.

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(1) 10 Ex. 84.
(2) E. B. & E. 91.
(3) 2 B. & S. 299.
(4) [See as to the power of a Local Legislature to regulate procedure affecting the penal laws which such Legislature has authority to enact. Pope *v.* Griffith and other cases; *ante*, pp. 291-314.]

NEW BRUNSWICK SUPREME COURT.

1874
April 25.

WHITTIER *v.* DIBLEE.

[*Reported 2 Pugsley, 243*].

Procedure in civil matters—32-33 Vict. c. 29, s. 134, D.

Quære, whether the Dominion Act 32-33 Vict. c. 29, s. 134, relating to costs in actions against Justices, is not *ultra vires* of the Federal Parliament as relating to procedure in a civil matter.

This was an action of trespass for assault and false imprisonment of the female plaintiff, tried before Fisher, J., at the Carleton Circuit in September, 1873. The defendant was a Justice of the Peace, and professed to act under the Statute of Canada 32-33 Vict. c. 20, s. 56. The learned Judge non-suited the plaintiff.

In the following Michaelmas Term a rule *nisi* was obtained to set aside the nonsuit.

April 20th, 1874, Mr. *C. H. B. Fisher* shewed cause, and referred on the question of costs to the Statute of Canada 32-33 Vict. c. 29, by secs. 130 and 134 of which it is provided, that in all actions and prosecutions to be commenced against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to Criminal Law, "if a verdict passes for the defendant, or the plaintiff becomes nonsuit, or discontinues any such action after issue joined, or if, upon demurrer or otherwise, judgment be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and shall

have the like remedy for the same as any defendant hath by law in other cases, and though a verdict or judgment be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge, before whom the trial shall be, certifies his approval of the action."

Mr. *E. L. Wetmore* in support of the rule.

The question of costs raised by the learned counsel is of no importance here; but that section (s. 134) of the Dominion Act is clearly *ultra vires* as it relates to procedure in a civil matter, which is entirely within the jurisdiction of the Local Legislature. (Ritchie, C. J.: That question does not arise here, but I think it worthy of all consideration.)

NEW BRUNSWICK SUPREME COURT.

1874
October.

ARMSTRONG *v.* MCCUTCHIN.

[*Reported 2 Pugsley, 381.*]

Insolvency—Imprisonment for debt, power of Local Legislature to abolish.

An Act of the Legislature of New Brunswick, abolishing imprisonment for debt, was held not to be *ultra vires*, as respects a party not shewn to be a trader or subject to the Dominion Insolvent Act.

The defendant was arrested in March, 1874, on an execution issued on a judgment obtained against him on a promissory note, and was in custody on the first day of October, when the Act 37 Vict. c. 7, to abolish imprisonment for debt, came in force; and applied to the Chief Justice, at Chambers, for an order for his discharge, by whom —it being objected by the plaintiff that the Act was *ultra vires*—the matter was referred to the Court. The affidavit set forth the fact of the defendant's imprisonment, and negatived the conditions stated in section 70, under which a person is liable to arrest, and also stated that the defendant was a farmer.

Mr. *W. Pugsley*, for the defendant.

This Act is very different from the Act 31 Vict. c. 16, which was declared *ultra vires* by this Court in *Reg.* v. *Chandler* (1). That Act provided only for the discharge of insolvent debtors, while the provisions of this Act apply to all persons, whether solvent or insolvent. The Local

(1) 1 Hannay, 556; *ante*, p. 421.

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ARGUMENT.

Legislature have power, by the B. N. A. Act, to deal with civil rights and procedure in civil matters in the Courts; and the Legislature, in this case, simply deals with the mode in which a creditor may be enabled to proceed to recover his judgment. In the case of *Valentine* v. *Hazleton* (1), heard on the equity side of this Court, it was held that an Act abolishing imprisonment for debt for more than two years did not come within the prohibition of the 91st section of the B.N.A. Act. Even though parts of the Act might be *ultra vires*—as, for instance, the portion relating to the term of imprisonment, in case of a debtor being found guilty of fraud, as being repugnant to the terms of the Insolvent Act of 1869—the remainder of the Act might still be good: *Reg.* v. *McMillan* (2).

Mr. *McLeod* and Mr. *Harrison* for the plaintiff.

The Act is *ultra vires*, as it deals with insolvency: it contemplates the discharge of the debtor because he cannot pay his debts in full. This objection applies to sections 75 and 76. Again, it deals with bankruptcy, for it virtually repeals certain sections of the Insolvent Act of 1869: it virtually does away with section 145 of that Act, relating to the discharge of the debtor, and is also repugnant to the 92nd section, which provides that a

(1) Stevens' Dig., 2nd ed., 1083.

VALENTINE *v.* HAZLETON.

[Dec., 1870.-(Allen, J.) An injunction was granted, directing a sheriff not to discharge a debtor in his custody on execution, under any Act of the Local Legislature, passed or to be passed. Subsequently an Act of the Local Legislature (33 Vict. c. 22) was passed declaring that no person should be held imprisoned in any civil suit longer than two years; and that when any person should be so confined the sheriff should forthwith discharge him, and should not be liable for an escape, or in any other suit in consequence thereof. The defendant, having been confined in a civil suit upwards of two years, demanded and obtained his discharge from the sheriff: *Held*, that the Act released the sheriff from obeying the injunction; and, therefore, an attachment against him was refused.

The Act (33 Vict. c. 22) relating to imprisonment for debt does not come within the prohibition of the 91st section of the B. N. A. Act, 1867, par. 21, "Bankruptcy and Insolvency."]

(2) 2 Pugsley, 112; *ante*, p. 489.

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ARGUMENT.

debtor fraudulently obtaining goods on credit may be imprisoned for two years, while this Act limits the term of imprisonment to six weeks. The Local Legislature might, perhaps, have power to abolish imprisonment for debt on mesne process, but not on final judgment. The Act clearly contemplates that, before getting his discharge, the debtor shall be shewn to have no means to pay the debt, otherwise the 76th section is meaningless. Section 75 provides that the debtor shall only be discharged in cases where he is not liable to arrest or imprisonment after the coming in force of the Act: by the 68th and 70th sections he is liable to arrest if he has means to pay the debt; therefore it is only insolvent persons who can take advantage of the Act, and it is as much beyond the powers of the Local Legislature as the Act of 1868, declared void in *Reg.* v. *Chandler* (1). By section 13, sub-s. *e*, of the Insolvent Act, it is made an act of bankruptcy for a debtor to remain imprisoned or on the limits for more than thirty days, and the Local Legislature has no power to take away what the Dominion Parliament has declared shall be an act of bankruptcy. (Ritchie, C.J.: It is equally an act of bankruptcy if a debtor permits any of his property to be taken in execution and held for a certain time; but, suppose the Local Legislature passed an Act declaring that Bank Stock should not be liable to seizure under execution, would such an Act be *ultra vires*?)

Pugsley in reply.

The judgment of the Court was delivered by

RITCHIE, C.J.:—

By the Imperial Act, legislation on Bankruptcy and Insolvency is confined exclusively to the Dominion Par-

(1) 1 Hannay, 556, *ante*, p. 421.

liament; and, in like manner, legislation on "civil rights" and "procedure in civil suits" belongs to the Local Legislature. Legislation on Bankruptcy and Insolvency necessarily involves an interference, to a certain extent, with "civil rights" and "procedure in civil suits," and, so far as such [interference] is necessary for and incident to legislation on Bankruptcy and Insolvency, it is within the power of the Dominion Parliament to deal with these subjects; and when the Local Legislature deals directly with Bankruptcy or Insolvency, or the legislation of the Dominion Parliament and the Local Legislature conflict, so much of the legislation of the Local Legislature as so deals, or interferes, or is in conflict with the legislation of the Dominion Parliament, when legislating within the limits of the subjects of Bankruptcy and Insolvency, is *ultra vires*. But, while legislation on the subject of imprisonment for debt may be, under some circumstances, involved in legislating on Bankruptcy and Insolvency, and therefore fit matter to be dealt with by the Dominion Parliament, it by no means follows that, under no circumstances, can the Local Legislature legislate with reference thereto. On the contrary, there may be many cases where the abolition or regulation of imprisonment for debt is in no way mixed up with or dependent on insolvency. In this case, in which application has been made for discharge under the Local Act, the party does not appear by the affidavits to be in any way amenable to the Insolvent Act of 1869, nor a person who could be brought within the operations of that Act; nor, so far as he is concerned, or as applicable to his case, are the clauses of the Local Act, under which he seeks his discharge, in any way in conflict with that Act. The defendant simply appears in the position of a person not subject to the Insolvent Act of 1869, and whom the Legislature has declared shall not be proceeded against for recovery of a debt by

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imprisonment, without reference to any question of solvency or insolvency; and, therefore, there is no reason why he should not receive the benefit of an Act passed by the Local Legislature for regulating the procedure in civil suits in relation to the civil rights of parties in the recovery of debts. So, far, therefore, as the defendant is concerned—and we limit our decision to the particular circumstances of this individual case—there is no reason why the Act should not have full force and effect. *Regina* v. *Chandler* (1), which was so much pressed on us, is, we think, entirely distinguishable from the present case.

(1) 1 Hannay, 556; *ante*, p. 421.

NEW BRUNSWICK SUPREME COURT.

REGINA *v.* THE JUSTICES OF THE PEACE OF THE COUNTY OF KING'S. 1875 February.

EX PARTE MCMANUS.

[*Reported 2 Pugsley, 535.*]

Spirituous liquors, Right of Local Legislatures to prohibit sale of— Trade and Commerce.

A New Brunswick Statute, 36 Vict. c. 10, empowered the General Sessions of the Peace to grant licenses as in their discretion they should think proper, and they having refused to grant a license to any person whatever, a mandamus was granted for the purpose of compelling them to issue a license to the applicant.

The Legislature of New Brunswick by an Act subsequent to Confederation declared that "no license for the sale of spirituous liquors shall be granted or issued within any parish or municipality in the Province when a majority of the ratepayers residents in such parish or municipality shall petition the Sessions or Municipal Council against issuing any license within such parish or municipality." Prior to Confederation there had been no legislation of this character in New Brunswick, and this enactment was held by the Supreme Court of that Province to be beyond the competence of the Legislature (1).

See *Corporation of Three Rivers* v. *Sulte*, and *Keefe* v. *McLennan*, *ante*, pp. 250, 400.

In Trinity Term, 1874, Mr. *S. R. Thomson*, Q.C., on behalf of *Montgomery McManus*, obtained a rule *nisi* for a mandamus to compel the Sessions of King's County to grant him a license to sell liquor. An affidavit was read, shewing that *McManus* had tendered the money for a

(1) [The above enactments are continued in the Consolidated Statutes of New Brunswick of 1877 as ss. 22 and 30 of c. 105.]

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license, which had been refused, the Justices absolutely declining to grant licenses to any person. The grounds on which the rule was granted were: 1st. That under the Act 36 Vict. c. 10, the Justices have the right to discriminate as to the persons to whom they will grant licenses, but no power absolutely to refuse them to all persons. 2nd. Assuming the Act to give them this power, it is *ultra vires* the Local Legislature, under the B. N. A. Act, 1867, (*a*) because it professes to deal with the criminal law; (*b*) because it interferes with trade and commerce.

Oct. 14. Dr. *Tuck*, Q.C., shewed cause.

The second section of the 36 Vict. c. 10, provides, that "the General Sessions of the Peace for the several counties in this Province are hereby empowered to grant wholesale and tavern licenses to such and so many persons of good character as they in their discretion shall think proper, to sell liquors by wholesale, or keep a tavern within their respective counties, demanding and receiving for every such license a sum not exceeding one hundred dollars, nor less than twenty dollars." To support the contention of the other side, it must be held that the word "empowered" is equivalent to "shall;" but it has no such meaning: it leaves the matter entirely in the discretion of the Justices. (Ritchie, C. J.: How do you read the word "discretion"? Must it not be a legal discretion?) It is an absolute arbitrary discretion, left by the Legislature advisedly in the hands of the Sessions. (Allen, J.: Would not the provision in a previous Act, that where two-thirds of the ratepayers petition the Sessions, they must refuse, rather seem to imply that, where there is no such petition, they should exercise a discretion as to the persons, but not altogether refuse?) No, because, if there is a petition, they have no discretion at all. The Sessions

have the power within themselves to grant licenses, or not, as they please. Then it is said this Act interferes with the powers of the Dominion Parliament, as relating to the criminal law. The same question came up in the case of *The Queen* v. *McMillan*(1), which expressly decided that for all matters on which the Local Legislatures had a right to legislate, they had also a right to legislate for the purpose of carrying them out. (Ritchie, C. J.: The B. N. A. Act, in one section says, the Local Legislature shall have the right to legislate as to tavern licenses for the purposes of revenue. Is not the inference from that rather that they have no right to legislate against the raising of a revenue?)

The third and perhaps most important objection is, that the Act 36 Vict. c. 10, has reference to trade and commerce, and that all matters relating thereto are, by the B. N. A. Act, given exclusively to the Federal Parliament. I presume it will be contended that the Sessions, by refusing to grant licenses, and so preventing the sale of articles from which a revenue can be collected, are interfering with the trade and commerce of the country. My answer is, that the "trade and commerce" there referred to mean trade and commerce with foreign countries. (Ritchie, C. J.: Take the case of a vessel coming from France to this country laden with liquors. She is a foreign vessel, owned by foreigners; she comes to St. John, the consignee pays the duty, and the vessel goes to Rothesay, where he finds he cannot by law sell his goods. Why might not the same provision be applied to tobacco, sugar, silks, and satins? What would be the result? This man is told by the Dominion Government he has a right to sell, by taking his money for duties, and yet he finds he cannot dispose of his goods.) Then, how can the Sessions regulate the licenses, as they may

(1) 2 Pugsley, 110; *ante*, p. 489.

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thereby restrict the sale, by making the charges so high that the dealers could not pay them? (Ritchie, C. J.: In such a case, they would come to this Court, and it might enquire whether the charge was made so high for the purpose of revenue, or to prohibit it, and without discussing that point now, it is possible this Court might interpose. Take the case of wholesale licenses, the same thing could be done as has been done here with the retail.) I admit it is an interference with trade, but not such an interference as is meant or contemplated by the Act. (Allen, J.; What do you say is?) If there was a restriction on the importation, before it gets into the country, that would be. (Allen, J.: Does not the prevention of the sale effectually prevent its importation?) That might be the result, but the Legislature does not directly legislate to that end. (Ritchie, C. J.: There is another word in the B. N. A. Act besides "Commerce"—"Trade," which is defined as being the "exchange of goods for other goods, or for money; and business of buying and selling," etc.; while "Commerce," on the other hand, is defined as "an interchange of goods, wares, productions, or property of any kind, between *nations* or individuals." If the signification of the term "trade" is extended to that of "commerce," there is a redundancy of words.) I think the words are used as synonymus. (Ritchie, C. J.; Can we believe that the Legislature would use two words—each having a distinct meaning—as synonymous? Is there not an authority that there is nothing more dangerous than to say that two words are to bear an equivalent meaning, when ordinarily they have distinct meanings?) If the word "trade" in the B. N. A. Act means all internal trade, our Legislature could not in any way touch or affect trade between even St. John and Fredericton. (Ritchie, C. J.: I should doubt if it could; and reasonably not, because the other Provinces might be

materially interested in the local trade between different parts of the same Province). Counsel cited 1 *Kent Com.* 488-492.

Mr. *S. R. Thomson*, Q.C., in support of the rule.

The word "empowered" means a power, coupled with a trust. (Ritchie, C. J.: In other words, you say that "empowered to grant" does not give power to withhold.) If a man is empowered to do anything for the benefit of another, he is bound to do it; he has no power to refuse. This was a power accompanied with a duty, which the Sessions must not abuse; they are bound to grant licenses to decent persons. It was, in other words, a public trust granted to the Sessions for the benefit of the people. They were to exercise their "discretion," which by the Imperial Dictionary is defined to mean "Prudence or knowledge and prudence; that discernment which enables a person to judge critically of what is correct and proper, united with caution." Had the word been "caprice," the contention of the counsel on the other side would be applicable. Where was the caution here—the discernment? It must be done with a sound discretion, exercised according to law. The Legislature clearly—from the wording of the Act—intended the Sessions could not arbitrarily withhold licenses unless there was a petition. The Imperial Dictionary also defines the meaning of the word "empower" thus: it says: "The Sessions of Scotland are empowered to try causes." Could they refuse? The County Courts in this Province are empowered to try causes up to $200; and could the Judge refuse to try such a cause? I do not contend that the 36 Vict. c. 10, with my construction, is *ultra vires*; but if it is as contended for by the other side, it is so. Does my learned friend say the Local Legislature could provide that no one should exercise the business of an auctioneer?

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(*Per Cur.*: If Mr. *Tuck's* contention is correct that, as a general proposition, the Local Legislatures have the right to prohibit the sale of liquors, where was the necessity of specially allowing them to regulate licenses, as they would have that right anyway ?) The Act in this particular merely excepts out of trade what would otherwise have gone to the Federal Parliament. But the power to control is only given in a limited way—only to enable them to raise a revenue. The Local Legislatures have the right, and only the right, to regulate the licenses in order to raise a revenue. Where do they get it for the purpose of destroying the revenue ? Wherever there is a doubt, the subject should be held to come within the jurisdiction of the Federal Parliament.

The judgment of the Court was delivered by

RITCHIE, C. J. :—

This was an application for a mandamus to the Justices of King's County to compel them to grant a tavern license to one *Montgomery McManus*. Application had been made by *McManus* to the Sessions for a license, in February, 1874, and the usual fee tendered. The Sessions refused to grant a license, alleging as a reason that they did not intend to grant any license to sell spirituous liquors for that year. *McManus* was shortly afterwards fined for selling liquor without a license.

In shewing cause against the application it was objected: 1st. That the power given to the Parliament of Canada by the B. N. A. Act, 1867, sec. 91, to regulate trade and commerce, meant trade and commerce with foreign countries, and that the power to make laws respecting tavern licenses belonged exclusively to the Provincial Legislature, by the 92nd section of the Act. 2nd. That by the Act of Assembly 36 Vict. c. 10, s. 2, it

was entirely in the discretion of the Sessions whether they granted licenses or not; that it was an arbitrary discretion which could not be questioned.

To the Dominion Parliament of Canada is given the power to legislate exclusively on "the regulation of trade and commerce," and the power of "raising money by any mode or system of taxation." The regulation of trade and commerce must involve full power over the matter to be regulated, and must necessarily exclude the interference of all other bodies that would attempt to intermeddle with the same thing. The power thus given to the Dominion Parliament is general, without limitation or restriction, and therefore must include traffic in articles of merchandise, not only in connection with foreign countries, but also that which is internal between different Provinces of the Dominion as well as that which is carried on within the limits of an individual Province. (1.)

As a matter of trade and commerce, the right to sell is inseparably connected with the law permitting importation.

If, then, the Dominion Parliament authorize the importation of any article of merchandise into the Dominion, and places no restriction on its being dealt with in the due course of trade and commerce, or on its consumption, but exacts and receives duties thereon on such importation, it would be in direct conflict with such legislation and with the right to raise money by any mode or system of taxation if the Local Legislature of the Province, into which the article was so legally imported, and on which a revenue was sought to be raised, could so legislate as to prohibit its being bought or sold, and to prevent trade or tariff therein, and thus destroy its commercial value, and with it all trade and commerce in the article

(1) [But see Citizens' Ins. Co. v. Parsons, 7 App. Cas. 96; *ante*, vol. 1, p. 265.]

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so prohibited, and thus render it practically valueless as an article of commerce on which a revenue could be levied. Again, how can the Local Legislature prohibit, or authorize the Sessions to prohibit (by arbitrarily refusing to grant any licenses), the sale of spirituous liquors of all kinds, without coming in direct conflict with the Dominion Legislature on the subject of inland revenue, involving the right of manufacturing and distilling or making of spirits, etc., as regulated by the Act 31 Vict. c. 8, and the subsequent Acts in amendment thereof, and the excise duties leviable thereby, and the licenses authorized to be granted thereunder.

Cases from the United States Courts were cited as bearing on this question; but there is a very clear distinction between the powers of Congress and the powers of the Dominion Parliament. In the United States Congress has not the same full power of regulating trade and commerce that belongs to the Dominion Parliament. The power of Congress, as we understand it, is confined to "regulating commerce with foreign nations and among the several States," giving no right to interfere with the internal commerce of an individual State, that it does not extend to that commerce which was completely internal, carried on within the particular State, and which did not extend to or affect other States, but is restricted to that commerce which concerns more States than one, reserving the completely internal commerce of a State for the State itself, and therefore State license laws have been held constitutional and valid. But even there, as we understand the cases, it has been held that the sale of the imported liquors by the importer in the original casks would seem not to be affected; but when the importer parts with the goods imported and changes their condition, his rights and all rights respecting the sale claimed under the laws of the United States

are gone, that is, so soon as they become mixed with, or incorporated into, the general mass of the property of the State, they become subject and liable to State legislation.

Under the B. N. A. Act, 1867, the Local Legislatures have no powers except those expressly given to them; and with respect to the granting of licenses affecting trade, they are expressly confined to "shop, saloon, tavern, auctioneer and other licenses, *in order to the raising of a revenue* for provincial, local or municipal purposes,"—a provision under which a revenue may be derived from the sale and traffic, but which the prohibition of the sale or traffic would entirely destroy, and which would be in direct antagonism with the privilege thereby conceded.

We by no means wish to be understood that the Local Legislatures have not the power of making such regulations for the government of saloons, licensed taverns, etc., and the sale of spirituous liquors in public places, as would tend to the preservation of good order and prevention of disorderly conduct, rioting or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police, and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate; but if, outside of this, and beyond the granting of the licenses before referred to, in order to raise a revenue for the purposes mentioned, the Legislature undertakes directly or indirectly to prohibit the manufacture or sale, or limit the use of any article of trade or commerce, whether it be spirituous liquors, flour, or other articles of merchandise, so as actually and absolutely to interfere with the traffic in such articles, and thereby prevent trade and commerce being carried on with respect to them, we are clearly of opinion they assume to exercise a legislative power which pertains ex-

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clusively to the Parliament of Canada, and in our opinion the Act of the Local Legislature (34 Vict. c. 6), declaring that "no license for the sale of spirituous liquors shall be granted or issued within any parish or municipality in the Province when a majority of the ratepayers, residents in such parish or municipality, shall petition the Sessions or Municipal Council against issuing any license within such parish or municipality," is *ultra vires* the Local Legislature of this Province.

Rule absolute for mandamus.

NEW BRUNSWICK SUPREME COURT.

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May.

GANONG *v.* BAYLEY.

[*Reported 1 Pugsley and Burbidge, 324.*]

Judges, appointment of—B. N. A. Act, ss. 92, sub-s. 14, and 96—39 Vict. c. 5, N. B.

By an Act of the Legislature of New Brunswick since Confederation, 39 Vict. c. 5, it was provided that Courts should be established for the trial of civil causes before Commissioners appointed by the Lieutenant-Governor in Council. The jurisdiction of the Commissioners was limited to $40 in actions of debt and $16 in actions of tort, and was further restricted in special cases. On an application to set aside a judgment obtained before a Commissioner appointed as above provided, on the ground that since the passing of the B. N. A. Act a Lieutenant-Governor had no power to appoint judges of any kind, the New Brunswick Act was held to be valid. (1)

Allen, C. J., and Duff, J., dissenting.

In this case an application had been made to a Judge at Chambers to set aside a judgment obtained in the Parish of St. Stephen Civil Court, before the Commissioner appointed under the Act of Assembly, 39 Vict. c. 5, (2) intituled "An Act to establish Parish Courts," and

*Present :—ALLEN, C. J., and WELDON, FISHER, WETMORE and DUFF, JJ.

(1) [See also Reg *v.* Coote, L. R. 4 P.C. 599, *ante*, vol. 1, p. 57 ; Reg. *v.* Horner, *ante*, p. 317 ; Reg. *v.* Bennett, 1 Ont. Rep. 445, *post* ; and *In re* Wilson *v.* McGuire, 2 Ont. Rep. 118, *post*.]

(2) 39 Vict. c. 5, s. 1 (Con. Stat. c. 59, s. 1) : "There shall be a Court in each parish in this Province, except in parishes where there is a resident police or stipendiary magistrate having civil jurisdiction therein, for the trial of civil causes as herein provided, to be held before a Commissioner, being a justice of the peace, which Commissioner for each parish shall be appointed by the Lieutenant-Governor in Council, and such Court shall be called 'The Parish of Civil Court.'"

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was by him referred to the Court, and put on the motion paper.

In Hilary Term last, Mr. *Weldon*, Q.C., argued in support of the motion, and, besides taking an objection that the plaintiff had recovered for consequential damages, which objection, however, the Court thought was not supported by the evidence, he said there was a point of much importance involved in the case, namely, whether the Local Legislature had the power to create these Parish Courts, and again whether the Commissioners must not be appointed by the Dominion Government. These are District Courts, and come within the meaning of the 96th section of the B. N. A. Act, 1867. The nomenclature of the Court is no criterion of its character. The Local Legislature may, under section 92, sub-section 14, maintain and organize Provincial Courts; but the constitution of the Court is one thing, the appointment of a Judge quite another. The former includes the establishment of the machinery and the giving of the powers to be exercised

Mr. *King*, *A.G.*, contra.

The B. N. A. Act gives to the Local Legislature the power to establish and maintain Courts. *Ex vi termini* Court includes Judge, and in the power to organize

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Sect. 2: "Every such Commissioner shall have jurisdiction in the county in which he resides, and for which he may have been appointed a Justice of the Peace over the following civil actions:—

"*First*—Actions of debt, including any claim for a sum certain due upon a specialty, when the sum demanded does not exceed forty dollars.

"*Second*—Actions of tort to real or personal property when the damages claimed do not exceed sixteen dollars; but no Commissioner shall have jurisdiction over civil actions where the Queen is a party, or where the title to land shall come in question, or the action is for the recovery of a debt exceeding forty dollars, unless the same be reduced by payment or abandonment to that sum, or when the action is for debt against the personal representatives, trustees of absconding debtors, assignees of bankrupts, or banking or insurance companies, and the defendant in any suit where set-off is allowed shall have the same right of crediting payment and of abandonment in setting off adverse claims."

establish and maintain Courts, there is necessarily the power to appoint the Judges. This is in accordance with the maxim given in Pott. Dwarr. Stat. p. 123, maxim 8, "In statutes, incidents are always supplied by intendments; in other words, wherever a power is given by a statute, everything necessary to the making of it effectual, is given by implication; for the maxim is '*Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.*'" It is said, however, the power that would reside in the Local Legislatures is cut down by section 96 of the Act. But it must be remembered, that there were in Canada District Courts which would be covered by the term, though not *eo nomine*. That they were also of a superior jurisdiction, territorial or otherwise, to the County Courts, is evident from the fact that the word "Superior" is first, then "District," and then "County": Pott. Dwarr. 217. He also referred to the Consolidated Statutes of Canada, p. 636, and to *The Warden, etc., of St. Paul's* v. *The Dean* (1).

Weldon, Q.C., in reply.

The Court can only judge of the intention of Parliament from the language used, having reference to the facts existing at that time: *Logan* v. *The Earl of Courtown* (2).

WELDON, J.:—

This was a review from the Commissioners' Court in the parish of Saint Stephen, established under the Act 39 Vict. c. 5, intituled "An Act to establish Parish Courts," before Mr. Justice Duff; upon the objection taken that the Act vesting the appointment in the Lieutenant-Governor in Council was in violation of the Confederation Act of 1867, and the Justice had no juris-

(1) 4 Price, 65. (2) 13 Beav. 22.

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diction. There was another objection that the cause was not within the jurisdiction of the Justice as such Commissioner.

The first objection is what we are asked to give an opinion upon. It was urged by counsel in support of the objection that in the distribution of powers by the B.N.A. Act 1867, section 92, sub-section 14, the Local Legislature had the power to establish Courts for "the administration of justice in the Province including the constitution, maintenance, and organization of Provincial Courts both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts;" that this did not give the Executive the power of appointing Judges in those Courts, which power was reserved to the Governor-General under section 96 of the said Act: "The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

At the time of the passing of the Confederation Act, there were Superior Courts in all the Provinces which were embraced in the Confederacy. There were District Courts in Canada. In Lower Canada, there were the districts of Gaspe, of Saguenay, and of Chicoutimi; there were the County Courts existing in Upper Canada, and subsequently were established in New Brunswick, Nova Scotia and Prince Edward Island. It appears to me these were the Courts that the Governor-General was to appoint the judges to, when established, or as vacancies may occur, and to provide for them salaries, allowances, and pensions.

There were also, at the time of passing of the Confederation Act, Commissioners' Courts for the summary trial of small causes in what is now the Province of Quebec, and there were Division Courts in Ontario. No reference

is made to them in the said Act. The several Acts establishing these small Courts in the several Provinces, prior to Confederation, also provided for the appointment of officers thereof by the several Local Executives, and were not referred to or expressly provided for in the said Act.

I am therefore of opinion the Local Legislature in passing the Acts for the recovery of small debts in the respective parishes of the county, and providing for the appointment of persons to carry out the provisions thereof by the Local Executive, was within its powers, and in such case the executive authority continued as it existed at the Union, unless the same was altered by the provisions of the Union Act, which is not expressly done.

There were many officers which the Governor-General had the appointment of vested in him as the Queen's representative to make in the Provinces; but that power may be limited by the passing of Acts by the Local Legislature, assented to by the Governor-General; and any Act creating an office and vesting the appointment in the Governor and Executive Council, would be valid, if not disallowed by the Governor-General as provided for in the Union Act.

This principle appears to be fully recognised in a despatch from the Earl of Kimberley, the Colonial Secretary, to the Governor-General, dated Downing Street, the 1st February, 1872, to Lord Lisgar, the then Governor-General, in reference to the appointment of Queen's Counsel. His Lordship, after stating the appointment was vested in the Queen, to be exercised by the Governor-General as her representative, says, "I am further instructed that the Legislature of a Province can confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel." This principle has

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been carried out in various Acts of our Legislature, and the power of appointment which was in the Crown to be exercised by the representative of the Queen, has been transferred to the Lieutenant-Governor in Council.—Act 31 Vict. c. 30, for the appointment of members of the Legislative Council; 32 Vict. c. 92, for appointment of Justices of the Peace; 32 Vict. c. 93, relating to Marriage Licenses; 36 Vict. c. 3, an Act respecting the appointment of Notaries Public; 36 Vict. c. 21, respecting the appointment of Queen's Counsel; 32 Vict. c. 6, relating to the presentation of Rectors of the Church of England in the Province; 34 Vict. c. 1, the appointment of Police Magistrate in Fredericton and giving him jurisdiction in civil suits to the extent of $40. All these Acts are transferring the power from the Crown to the Lieutenant-Governor, and restraining the exercise of the executive power of the Governor-General. Some of these Acts are specially approved of by the Governor-General others left to their operation.

As the Act establishing Parish Courts has not been disallowed by the Governor-General, as directed under the 90th section of the Union Act, I am of opinion it was within the power of the Legislature to pass the Act, and the appointment of Commissioners by the Lieutenant-Governor in Council properly exercised, and the Act valid.

The other question was disposed of at the argument.

FISHER, J.:—

I agree with my brother Weldon, in the conclusions at which he has arrived, and in much of his reasoning, though I do not adopt all the reasons he has stated. I have not had time to write my views, but will briefly state the leading principles of my judgment.

It was urged that the Justice, or Commissioner, as he

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is called, who tried the cause, had no jurisdiction, and that it must be recognised that so much of the Act, 39 Vict. c. 8, intituled "An Act to establish Parish Courts," as authorized the Lieutenant-Governor to appoint a Commissioner to try causes in the Court established, is *ultra vires*, and that the appointment of such Commissioner is void; that the power of appointing Judges of the class referred to in this Act, is by the B. N. A. Act, 1867, in the Governor-General.

The 14th paragraph of sect. 92 of the B. N. A. Act, 1867, confers upon the Local Legislatures the power of providing for the constitution, maintenance and organization of Provincial Courts, so that the authority to legislate upon the subject is clear. Having so legislated, had the Local Legislature power to give the appointment of the persons who are to try the causes, or administer justice in the Courts to the Lieutenant-Governor, or must such appointments vest in the Governor-General? This depends upon the meaning of sects. 96, 97, 98, 99 and 100 of the B. N. A. Act, construing all these sections together, and in that way they explain each other.

It is obvious that it was the intention of the Act to vest in the Governor-General only the appointment of the Judges of the County Courts, and those of a more extensive or Canadian jurisdiction. At the time of the Union, there were in existence Courts and Judges of Courts answering the description given in these sections, having both civil and criminal jurisdiction. It being required that they should be appointed from the Bar, shewing that they must have received a professional education, evidences the mind of the Legislature as referring only to Judges of a higher class. Then the charging the revenues of Canada with their salaries and pensions, of itself, shews that the sections all refer to a higher class.

When the B. N. A. Act, 1867, came into operation, there

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were, in Nova Scotia and New Brunswick, Courts for the trial of small causes in the different localities, similar to those authorized by the Act of 39 Vict. c. 5, presided over by Justices of the Peace, the class of persons who are now appointed; and the only difference is, that instead of every Justice of the Peace having power to try, it is now restricted to such of the Justices as the Lieutenant-Governor shall specially appoint therefor, and they have jurisdiction now to a larger amount. In Nova Scotia the Act that gave one Justice power to try causes not exceeding $20 authorized any two Justices to try to the amount of $80. All these Acts are very similar in their provisions as to the mode of jurisdiction, and persons appointed to preside in the Court they established. The Justices of the Peace who are the Judges of these Courts, styled Commissioners, may be farmers, merchants, mechanics, or any other class; and it does seem to me to be very preposterous to suppose that they come within the category of Judges specified in the different sections of the B. N. A. Act to which I have referred.

WETMORE, J.:—

The question in this cause is as to the power of the Lieutenant-Governor to appoint a Commissioner under an Act to establish Parish Courts, 39 Vict. c. 5, it being contended the appointment is with the Governor-General under the B. N. A. Act, 1867.

By sect. 1 of the Local Act, a Court is thereby established in each parish in the Province (except in parishes where there is a resident police or stipendiary magistrate, having civil jurisdiction therein) for the trial of civil causes as provided by the Act, *to be held before a Commissioner, being a Justice of the Peace*, the Commissioner to be appointed by the Lieutenant-Governor in Council,

and such Court to be called "The Parish of Civil Court."

The jurisdiction of the Commissioner is given: Actions of debt, including any claim for a sum certain due upon a specialty, when the sum demanded does not exceed forty dollars.

Actions of tort to real or personal property when the damages claimed do not exceed sixteen dollars. The Commissioner has no jurisdiction over civil actions where the Queen is a party, or where the title to land shall come in question, or the action is for the recovery of a debt exceeding forty dollars, unless the same be reduced by payment or abandonment to that sum, or when the action is for debt against the personal representatives, trustees of absconding debtors, assignees or bankrupts, or banking or insurance companies. Defendant, where set off is allowed, has the same right of crediting payment, and of abandonment in setting off adverse claims.

All proceedings in the Parish Court shall be, in all respects (except as specially provided by the Act), under the provisions of the law relating to proceedings in Justices' Civil Courts.

The oath the Commissioner, before acting, is required to take, is,—I, A. B., do swear that I will faithfully, impartially and honestly, according to the best of my skill and knowledge execute all the powers and duties of a Commissioner for the Parish of Civil Court.

The jurisdiction is merely an increase of that given to Justices of the Peace under the Act of the Courts of Justices. Rev. Stat. c. 137, title xxxvii. That Act limiting the jurisdiction in debt to five pounds, and in tort to forty shillings.

The Commissioner's Court is, I think, simply a Justice's Court with increased jurisdiction. The Commissioner is to be a Justice of the Peace. The only reason

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for the title Commissioner that I can see, is to distinguish him from the other Justices, because the right to exercise the extended jurisdiction is confined to him. I do not think if the jurisdiction of all Justices of the Peace was increased to the extent provided by the Act, any new appointment for the magistrates to act would be required, or that they could not, under their previous appointment, proceed upon the extended jurisdiction, still less that the Justices, to empower them to act under the extended jurisdiction would, before acting, require to be appointed by the Governor-General. The conferring the power to act to one of the body of Justices and designating him as a Commissioner, I think, would not alter the matter.

By sect. 92 of the B. N. A. Act, under head "Exclusive Powers of Provincial Legislatures," the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereinafter enumerated,—among them (sub-section 14): "The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts." The Legislature have enacted the law which gives the Governor in Council the appointment of the Commissioner, and if this is not *ultra vires* the matter is concluded.

Sub-section 16: "Generally all matters of a merely local or private nature in the Province." The legislating for the appointment of such an officer as Commissioner under the Act, seems to be entirely of a local character, but as to the 14th sub-section (the constitution and organization of Provincial Courts), is the legislating for the appointment of a person to administer the provisions of the enactment (the Commissioner) any more than a part of the constitution of the Court, or the organization of the Court? Can the Court be said to be organized or

constituted without appointing an officer to carry out the law which the Act provides to be administered? It seems to me not, and unless the Legislature is deprived of the power of legislating on this most important part of the constitution and organizing of the Court, I think it must be concluded in this sub-section 14. It is argued that the appointment is vested in the Governor-General by section 96, by which the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

There were Magistrates' Courts in Nova Scotia and New Brunswick; to these Courts the 96th section could not extend. By section 100 the salaries, allowances and pensions of the Judges of the Superior Courts (except the Courts of Probate in Nova Scotia and New Brunswick) shall be fixed and provided by the Parliament; and if these Commissioners are to be considered Judges to be appointed by the Governor-General, under sect. 97, they must be appointed *from the Bar*. By that section, until the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and the procedure of the Courts in these Provinces, are made uniform (a state of things not as yet existing), *the Judges* of the Courts of these Provinces appointed by the Governor-General (this includes all the Judges the Governor-General has power, under the Act, to appoint) shall be selected from the respective *Bars* of these Provinces. The onerous duty upon the Governor-General of appointing Commissioners for each parish in the Province, and the necessity of paying the salaries, allowances, and it may be pensions, I think is not required to carry out such an Act as this.

When the B. N. A. Act passed, there were Courts to fill the term District Courts in Quebec. Consolidated Statute of Lower Canada of 1861, page 636, establishes Dis-

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tricts, and by it Judges of the Supreme Court are assigned to the several districts. There were Courts existing to fill all the Courts named in the 96th section, and, therefore, it is unnecessary to search for another Court to meet the requirements of the section. In this Province we have the same rights and powers we had before Confederation, excepting where our former privileges and powers are interfered with by the B. N. A. Act, which I do not think extends to deprive our Local Legislature from legislating to the extent of the present Act.

ALLEN, C.J.:—

This action was tried in "The Parish of Saint Stephen Civil Court," before the Commissioner appointed under the Act of Assembly, 39 Vict. c. 5, intituled "An Act to establish Parish Courts."

The first section enacts as follows: "A Court is hereby established in each parish in this Province, except in parishes where there is a resident police or stipendiary magistrate having civil jurisdiction therein, for the trial of civil causes as herein provided to be held before a Commissioner, being a Justice of the Peace, which Commissioner for each parish shall be appointed by the Lieutenant-Governor in Council, and such Court shall be called 'The Parish of Civil Court.'"

The 2nd section declares that "Every such Commissioner shall have jurisdiction in the county in which he resides, and for which he may have been appointed a Justice of the Peace over the following civil actions: 1st. Actions of debt, including any claim for a sum certain due upon a specialty, when the sum demanded does not exceed $40; 2nd. Actions of *tort* to real or personal property, when the damages claimed do not exceed $16," etc.

Objection was taken on the trial to the jurisdiction of the Commissioner, and the question is, whether the

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Provincial Legislature had any authority to pass an Act authorizing the Lieutenant-Governor in Council to appoint Commissioners to hold these Courts, and whether the Lieutenant-Governor had any power to appoint them.

Whatever power the Lieutenant-Governor or the Provincial Legislature has in the matter, must be derived from the B. N. A. Act, 1867, which materially altered the constitution of this Province, and limited the powers of the Lieutenant-Governor, as they had existed before Confederation, when he derived his authority directly from the Sovereign.

The 58th section of the B. N. A. Act declares, that "for each Province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada."

Before the union of the Provinces, the Lieutenant-Governor exercised such of the prerogatives of the Crown as were delegated to him by his commission, and the Royal instructions which accompanied it, *Hill* v. *Bigge* (1); but now the Governor-General alone is appointed by the Queen's commission, and acts as the representative of the Sovereign in the Dominion.

The Queen, as the fountain of justice, has the exclusive power of establishing Courts and appointing Judges in the Dominion, unless that power has been taken away by the Act of Parliament, and Her Majesty exercises that right through her representative, the Governor-General.

In Chitty on Prerogs., p. 6, it is said: "As the fountain of justice and administrator of the laws, all judicial power is supposed to be derived from the Crown, and though the King himself possesses none, yet he appoints those by whom it is exercised, and constitutes Courts and

(1) 3 Moo. P. C. C. 465, 476.

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offices;" and again, in page 75, "the prerogative of creating Courts and offices has been immemorially exercised by the Kings of England, and is founded on the capacities of executive magistrate and distributor of justice, which the constitution of the country has assigned to the Sovereign." . . . "The Judges can, generally speaking, derive their authority, only, from the Crown." Co. Lit. 260. Bac. ab. "*Courts*" (B). "The right to name Justices of the Peace was vested in the Crown by statute 1 Ed. 3, c. 16. They are appointed by the King's commission, under the Great Seal."

The Governor-General's commission, dated 22nd May, 1872, contains the following clause: "III. And we do further authorize and empower you to constitute and appoint in our name, and on our behalf all such Judges, Commissioners, Justices of the Peace and other necessary officers and ministers of our said Dominion, as may be lawfully constituted or appointed by us."

It was contended that the Lieutenant-Governor had the power to appoint in this case, for two reasons. 1st, Because, under the 92nd section of the B. N. A. Act, 1867, the exclusive power of legislation, respecting the administration of justice and the constitution of Courts in the Province, was vested in the Provincial Legislature; and, 2nd, Because the 96th section of the Act having defined what Judges were to be appointed by the Governor-General, by necessary implication all others were to be appointed by the Provincial Government.

As to the first ground, under the head of "*Exclusive Powers of Provincial Legislatures*," the 92nd section enacts as follows: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: (Then follows a number of subjects, and paragraph 14 declares as follows): "The adminis-

tration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

So far as regards the right of the Provincial Legislature to pass an Act to establish Parish Courts, and to define their powers and regulate their procedure, there can be no doubt; but this does not meet the question. They are to "make laws" respecting the constitution, etc., of Courts; but to construe those words as giving them the power to direct by whom the judges of the Courts so constituted are to be appointed, seems to me to be extending their powers beyond what was intended by the Act, and to be a direct interference with the prerogative of the Crown. It was contended, and, no doubt, with much force, that a Court could not be "organized" without the appointment of a Judge. But the authority to legislate respecting the organization of a Court, does not necessarily mean that the Provincial Legislature can direct by whom the Judges are to be appointed, thus taking away one of the undoubted prerogatives of the Crown.

As to the second ground, the 96th section of the Act enacts as follows: "The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

It was contended that, according to the maxim *expressio unius est exclusio alterius*, the Provincial Government had the power to appoint the Judges of any Courts, not expressly named in this section to be appointed by the Governor General. It was also contended that the words "District and County Courts" must be construed to apply to certain Courts called District Courts existing in Lower Canada at the time the Act was passed, and to

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the County Courts at that time established in Upper Canada, and that they did not apply to the Courts established under the Act 39 Vict. c. 5, though they were territorially District or County Courts. While I am not prepared to dispute this construction of the Act, I do not see that it gets rid of the objection that the Lieutenant-Governor has not the right to appoint the Commissioner to the Parish Courts. Where does the Lieutenant-Governor get the authority to appoint? certainly not from his commission, even if the Governor-General could delegate the authority to him. Then does he get it from the Act of Parliament? He does not, unless it is by implication arising out of the fact that the 96th section enumerates the Judges that the Governor-General shall appoint. But it is a clear rule of law, that the prerogative of the Crown shall not be taken away by implication, it must be done by express words. Dwarr. Stat. 523. It was held in the *Magdalen College Case* (1), that where the King has any prerogative, estate or interest, he shall not be barred of them by the general words of an Act of Parliament, and in *Rex* v. *The Archbishop of Armagh* (2), it was admitted that the King should not be divested of any of his prerogatives, but by plain and express words for that purpose.

In Maxwell on Statutes, 112, it it said: "It has been said that the law is *prima facie* presumed to be made for subjects only; at all events, the Crown is not reached except by express words, or by necessary implication, in any case where it would be ousted of an existing prerogative. It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right, or property, unless it expresses its intention to do so in explicit terms or makes the inference *irresistible*," citing Inst. 191; Co. Litt. 43 *b*; 3 Bac. Ab. *Prerogative* (E) 5 (*c*).

(1) 11 Rep. 66 *b*.

(2) 8 Mod. 6.

And the principle is very fully stated by Lord Cairns in *Theberge* v. *Landry* (1).

The appointment of all Judges being the undoubted prerogative right of the Crown, and Her Majesty having delegated that right, in the Dominion, to the Governor-General, I can see nothing in the provisions of the B. N. A. Act, which, by necessary implication, has taken that right away from him, and vested it in the Lieutenant-Governor of this Province.

I cannot assent to the views put forward by one of my learned brothers, that the Act 39 Vict. c. 5 was a mere extension of the powers which Justices of the Peace already had to try cases of small amount. The Act in terms professes to establish a new Court. It is entitled "An Act to establish Parish Courts." It commences by declaring that "a Court is hereby established in each parish in this Province," and a particular title is given to this Court. It is true that the Judges to be appointed must be Justices of the Peace; but Justices, as such, have no jurisdiction under the Act, without an express appointment for the particular Courts so established; therefore it is not a mere extension of the jurisdiction of Justices of the Peace, but the creation of a new tribunal.

I cannot see how a despatch from Lord Kimberley to the Governor-General, respecting the appointment of Queen's Counsel, or other officers, can in any way affect the construction of the Act of Parliament, or the *authority* of the Local Government to make the appointments in question. Neither do I admit that the Local Legislature had authority to pass the Act 32 Vict. c. 92, relative to the appointment of Justices of the Peace, which is, unquestionably, one of the prerogatives of the Crown. And if the Local Legislature had no such right, the fact

(1) 2 App. Cas. 102; *ante*, p. 1.

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that the Governor-General did not disallow the Act, or that he expressly allowed it, cannot, in my opinion, give it validity. If authority is wanted to support this position, it will be found in the case of *Reg.* v. *Chandler* (1). And see *Reg.* v. *Wood* (2). The powers of the Provincial Legislature are now limited and defined by the Act of Parliament, and they cannot go beyond the powers delegated to them.

After the best consideration that I have been able to give this case, I am unable to come to the conclusion that the Lieutenant-Governor had authority to appoint the Commissioners under the Act, and consequently I think the judgment should be reversed.

My brother Duff has authorized me to state that he agrees with this judgment.

Judgment affirmed.

(1) 1 Hannay, 556; *ante*, p. 421.

(2) 5 E. & B. 49.

NEW BRUNSWICK SUPREME COURT.

EX PARTE ELLIS.

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February.

[*Reported 1 Pugsley & Burbidge, 593.*]

Criminal Law—Insolvency—Con. Stat. N. B. c. 38.

A Provincial Legislature has power to pass an enactment for the imprisonment of a person making default in payment of a sum due on a judgment, in case (*a*) he has had since the date of the judgment or order the means to pay the sum in respect of which he has made default, and neglects or refuses to pay it, or in case (*b*) the liability was incurred by obtaining credit under false pretences or by means of any other fraud or by the commission of an act for which he might be proceeded against criminally.

Weldon, J., dissenting.

The national Park Bank having obtained a judgment against *Ellis*, applied to Mr. Justice Wetmore for an order for *Ellis'* imprisonment for one year, under chapter 38 of the Consolidated Statutes (1). By sect. 32, sub-ss. 1

* Present:—ALLEN, C.J., and WELDON, FISHER, WETMORE, and DUFF, JJ.

(1) Con. Stat. (N.B.) c. 38, s. 30: "Subject to the provisions hereinafter mentioned, any Court may commit to prison for a term not exceeding one year, or until payment of the sum due, with or without privilege of bail or limits, any person who makes default in payment of any sum due from him in pursuance of any order or judgment of the Court."

Sect. 32: "And provided also, that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court or Judge, as the case may be—

"1) That the person making default either has or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same; *or*

"(2) That the person making default had, in incurring the debt or liability in respect of which he has made default, obtained credit under false pretences, or by means of any other fraud, or had incurred the liability by committing an act for the commission of which the person by the laws of the country where the same was committed, was liable to be proceeded against criminally."

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and 2, the authority to make the order of imprisonment is given where (*a*) the person making default has since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same, or where (*b*) the person making default had in incurring the debt or liability, in respect of which he has made default, obtained credit under false pretences or by means of any other fraud, or had incurred the liability by committing an act, for the commission of which the person by the laws of the country where the same was committed, was liable to be proceeded against criminally. The learned judge was of opinion that *Ellis* had the means of paying the judgment, and that he had incurred the liability by committing an act for which he was liable to be proceeded against criminally in the State of New York, where the act was committed, and made the order for imprisonment on both grounds.

Oct. 9, 1877. Mr. *Weldon*, Q.C., obtained a rule *nisi* for a writ of *habeas corpus*, on the ground that these provisions of the Act were beyond the power of the Local Legislature to enact.

Sect. 35: "The order of commitment shall direct the immediate payment of the amount for which default is made, and any costs awarded as aforesaid, and on non-payment of the same, that the defendant be committed, and the order shall state whether the commitment be with or without privilege of bail or limits; and the order of commitment shall be obeyed and executed by the sheriff: and on failure of payment the defendant shall be imprisoned according to the tenor of the order, and shall be discharged out of custody upon payment of the amount named in the order."

Sect. 36: "No imprisonment under the 30th section shall operate as a satisfaction or extinguishment of any debt or demand, or cause of action, or deprive any person of any right after such imprisonment to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place; and no discharge of any person from arrest or imprisonment shall affect the creditor's rights or remedies against the lands, goods or chattels of the person arrested or imprisoned, but the same shall be and remain as if such arrest or imprisonment had not taken place."

Oct. 23 and 24, Mr. *Barker*, Q.C., shewed cause.

The only question here is, whether or not the provisions of sections 28-33 of chapter 38 of the Consolidated Statutes, are within the powers of the Local Legisture. The effect of these sections is, that they constitute exceptional cases of imprisonment. The power to imprison formerly existed to its fullest extent. These exceptional cases still remain. My learned friend contends that the Act is *ultra vires*, in that it throws upon the judge the duty of deciding whether or not the defendant has committed an indictable offence. There is no legislating in criminal matters here. The Act does not create a crime, nor provide a punishment for a crime. Suppose *Ellis* could be tried here, Mr. Justice Wetmore's order would be no answer. The Local Legislature has control of the question of imprisonment for debt in civil suits. That is all this is. The imprisonment is not a punishment. If the defendant pays the judgment he goes free.

Formerly a *ca. sa.* issued without any order of the Court or a judge. This is only an order instead of a *ca. sa.*; both come from the Court, and whether you call it an order of attachment, makes no difference. It is nothing more than the execution on the equity side of the Court. The order is for the payment of the moneys, and if not paid, then comes the commitment. It is idle to argue that this is punishment. I never heard of such a doctrine. It is not a crime not to pay one's debts even if one has the means. Attachments for payment of money are in all cases civil remedies: *Rex* v. *Edwards* (1). If *Ellis* was in bankruptcy, he would be discharged from this arrest, because it is a civil and not a criminal proceeding; *Lees* v. *Newton* (2). But *Ellis* is not a trader, and he is not subject to the provisions of the Insolvent Act. There is no conflict with that Act here: *Armstrong* v. *McCutchin* (3).

(1) 9 B. & C. 652. (2) L. R. 1 C. P. 658. (3) 2 Pugsley, 381; *ante*, p. 494.

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It appears quite clear that the Local Legislature, having abolished imprisonment for debt, can give any process it sees fit for the purpose of giving effect to the judgments and orders of this Court. Outside of the question of crime, it is clear the learned judge had power to make the order in this case under the first sub-section, he being of opinion that *Ellis* was able to satisfy the judgment and refused to do it.

Mr. *Weldon*, Q.C., supported the rule.

I admit that the Local Legislature can regulate the process in civil suits, but it cannot indirectly punish an offence by giving a remedy in civil proceedings. At Common Law we had the two writs of *fi. fa.* and *ca. sa.* Under the first the defendant's goods were levied on; under the second his body was taken in satisfaction of the debt. Where a defendant was imprisoned under a *ca. sa.*, our statutes gave him the benefit of the gaol limits. I do not deny the power of the Legislature to abolish the *ca. sa.*, but I do its power to give a remedy like this. Formerly, taking the body under a *ca. sa.*, was a satisfaction of the debt, and if the defendant was discharged, the debt was extinguished. Subsequently an Act was passed allowing the plaintiff to discharge his debtor from arrest, and retain his execution against the defendant's property. By the Act under discussion, the Legislature has created a new jurisdiction for the Court or a judge. Is it not substantially an adjudication on an offence? The Legislature cannot indirectly obtain a jurisdiction for itself. Under this new process, the defendant may be deprived of his benefit of limits. Before the judge can make the order he must virtually try a crime, and the imprisonment is awarded as a punishment for it. It makes no difference that the defendant can discharge himself by payment. That is shewn by the case

of *Ex parte Graves* (1). A judge cannot imprison merely for non-payment of the debt, he must in addition to that find certain facts in the case involving the commission of an indictable offence. In all cases, such as attachment for contempt and other processes of imprisonment for non-payment of money, the imprisonment extinguishes the debt. Here it does not. (See section 38.) This is an attempt to establish *quasi* criminal proceedings. It is true that this order would be no answer to an indictment, but that only makes the matter worse, as the defendant would be punished twice. Clearly these provisions are *ultra vires*. The defendant is not imprisoned because he does not pay his debt, but because he has committed an offence.

Then, again, those sections are in conflict with the Insolvent Act. The Dominion Parliament could make the Insolvent Act apply to persons other than traders. The test is not what the Dominion Parliament has done, but what it can do. He referred to *Rex* v. *Edwards* (2), *Lees* v. *Newton* (3), *The Queen* v. *Chandler* (4).

The judgment of the majority of the Court (Allen, C. J., Fisher, Wetmore, and Duff, JJ.,) was delivered by

ALLEN, C. J.:—

The question raised in this case is whether that portion of the Consolidated Statutes, c. 38, sect. 32, which authorizes a judge to commit to prison any person making default in the payment of a sum of money due on a judgment, if the judge is satisfied that the person so making default has incurred the liability by committing an act for the commission of which he was, by the laws of the country where the same was committed, liable to be proceeded against criminally, is *ultra vires*.

(1) L. R. 3 Ch. 642.
(2) 9 B. & C. 352.
(3) L. R. 1 C. P. 658.
(4) 1 Hannay, 556; *ante*, p. 421.

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The contention on the part of the applicant is, that this provision is, in effect, legislating upon the Criminal Law, and is therefore beyond the power of the Local Legislature, as defined in the 91st and 92nd sections of the B. N. A. Act, 1867, by which the exclusive power of legislating upon "the Criminal Law" is given to the Parliament of Canada. The question then is, whether this 32nd section does undertake to legislate upon the Criminal Law of the Dominion, and declare that a certain act shall constitute a crime, punishable by the laws of the Dominion or of this Province? For unless it does, and is therefore beyond the jurisdiction of the Local Legislature, we are bound to give effect to it whether we approve of its provisions or not.

The chapter in question is headed, "Arrest, Imprisonment and Examination of Debtors." It professes to deal with the rights of creditors and the liability of debtors in civil suits only, their arrest and imprisonment on mesne process, and after final judgment, and their discharge from imprisonment. It neither adds to, nor in any way alters the Criminal Law of the Dominion, nor declares that any act of the debtor shall amount to a criminal offence. In fact it is only a limitation of the power, which a creditor had before the passing of the Act 37 Vict. c. 7, of arresting his debtor, both on mesne and final process, without the intervention of a judge's order, and retaining him in prison till the debt was paid, unless the debtor could obtain his discharge under the provisions of the Insolvent Confined Debtors' Act. Here the extent of imprisonment is a year, no matter what the amount of the judgment may be, with the benefit of the limits, if the judge so directs, and, with the right of the debtor at any time to obtain his discharge on payment of the amount of the judgment, and the costs of the order of commitment; and, indeed, he is not imprisoned at all, if

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he chooses to pay the amount. See section 35. Surely there is nothing in this which can be said to be legislating on the Criminal Law. The whole object of that part of the Act is to enforce the payment of the judgment, just as was formerly the object of issuing a *ca. sa.* execution against a judgment debtor. There is nothing in the Act making the refusal to pay the amount of the judgment an offence, or subjecting the debtor to a penalty for refusing, as there was in some of the cases cited. It was contended, however, that the second sub-section of section 32 does indirectly attempt to punish a party for criminal offences, and creates a tribunal to adjudicate thereon. That section is as follows:—"And provided also, that such jurisdiction (*i.e.*, of committing to prison), shall only be exercised where it is proved to the satisfaction of the Court or Judge. . . . That the person making default had, in incurring the debt or liability in respect of which he has made default, obtained credit under false pretences, or by means of any other fraud; or, had incurred the liability by committing an act, for the commission of which the person, by the laws of the country where the same was committed, was liable to be proceeded against criminally."

In adjudicating upon an application to commit a debtor to prison under this section, the judge must determine upon the evidence adduced before him, whether the debtor has committed a criminal offence according to the law of the country where the debt was incurred; and therefore it may be said that in ordering a debtor to be imprisoned the judge is, in fact, punishing him for a crime, and that the legislation which authorizes this proceeding, is legislating on the Criminal Law.

It appears to us, however, that notwithstanding this, the Local Legislature has not exceeded its powers.

By the 92d section of the B. N. A. Act, the Provincial

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Legislature has the exclusive right to make laws (*inter alia*) in relation to (13) "Property and civil rights in the Province." (14) "The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts." (15) "*The imposition of punishment* by fine, penalty, or *imprisonment*, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

Now, surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice, and procedure in civil matters in the Province, all of which are expressly within the jurisdiction of the Provincial Legislature. Having therefore the right to legislate on these subjects, the 15th subsection gives them power to enforce any such laws by imposing *imprisonment*. It would seem, therefore, that the powers conferred by this section of c. 38, Consolidated Statutes, are strictly within the 92nd section of the B. N. A. Act.

Another objection to the validity of the Act in question was, that it conflicted with the Insolvent Act of 1875, under the 127th section of which the Judge of the County Court might order a debtor imprisoned by a Judge of the Supreme Court, under section 32, to be discharged out of custody.

Admitting that the debtor might be entitled to be discharged under the Insolvent Act, which he probably would be if he was subject to the provisions of that Act. and [that] his imprisonment under the judge's order is an imprisonment in a civil suit, (see *Rex* v. *Edwards* (1), *Lees* v. *Newton* (2), *Bancroft* v. *Mitchell* (3), *Ex parte*

(1) 9 B. & C. 652. (2) L. R. 1 C. P. 658. (3) L. R. 2 Q. B. 549.

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Graves (1), does it follow that this proves the Act of the Provincial Legislature to be *ultra vires?* Might not his imprisonment, under the latter Act, be perfectly legal up to the time that he proved himself entitled to be discharged under the provisions of the Insolvent Act? As in the case of *Rex* v. *Edwards* (2), and *Lees* v. *Newton* (3), the imprisonment on the attachments for contempt, would be legal up to a certain period, but after that its continuance would be unlawful, because the party had shewn himself entitled to be discharged under the provisions of the Bankrupt Act; so, in the case of imprisonment under this Act, of a person subject to the provisions of the insolvent law, his imprisonment would be legal until it came into conflict with the Insolvent Act, by his obtaining an order for his discharge; and then the latter Act would prevail, because the Dominion Parliament alone can deal with the subject of insolvency, *Armstrong* v *McCutchin* (4). There may also be cases of imprisonment under this Act, of persons not subject to the provisions of the Insolvent Act; in such cases, no question of conflict could arise, therefore the two Acts are not necessarily inconsistent.

The *habeas corpus* will therefore be refused.

WELDON, J.:—

This application was made at the last Michaelmas Term for a writ of *habeas corpus*, to bring up the said *Thomas Ellis*, who is confined in the gaol at Saint John, at the instance of the National Park Bank of New York, by virtue of a warrant made by Mr. Justice Wetmore, on July 14th, 1877, under chapter 38 of the Consolidated Statutes, entitled "Arrest, Imprisonment and Examination of Debtors." The 28th section states, "No person

(1) L. R. 3 Ch. 642.
(2) 9 B. & C. 652.
(3) L. R. 1 C. P. 658.
(4) 2 Pugsley, 381; *ante*, p. 494.

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shall be arrested or imprisoned after judgment in any civil suit, or for making default in the payment of a sum of money, except as in this or any other chapter of the Consolidated Statutes is otherwise provided."

Section 32 provides for the exercise of, and gives jurisdiction to the Court in certain cases. The order is made in accordance with the 1st and part of the 2nd sub-section of said chapter.

The 33rd section provides how an order is to be made. The 35th section authorizes the commitment of the defendant, without privilege of bail or limits, or until payment is made of the amount named in the order, for the period named in the 30th section.

36th section. The imprisonment is no extinguishment of the judgment, and the plaintiff is not prevented from issuing an execution against the defendant's goods and chattels, lands or tenements, but the same remains as if no imprisonment had taken place.

The writ of *capias ad satisfaciendum* is taken away, and a new proceeding is substituted; it is a process new in law, not founded on the judgment, but on some state of facts to be found by the judge anterior to the commencement of the suit and judgment rendered in the cause, not referred to, or alleged in any of the proceedings in the cause, or whether a trial of the cause has been had, or assessment of damage by a jury; and it may be for an offence which the criminal law of Canada provides punishment for after an indictment has been found, and the party found guilty; or, for an offence which the party had committed, for the commission of which he, by the laws of the country, foreign or otherwise, where the same was committed, was liable to be proceeded against, criminally.

By the Insolvent Laws of Canada, if a party obtains money, or procures credit under false pretences, he is

liable to imprisonment for such offence, but the party so charged with such fraud has to be charged with it in the declaration in the suit, tried by a jury, and found guilty and judgment awarded against him before he can be sentenced to imprisonment.

The obtaining goods or credit on false pretences, is a crime well known in the Criminal Code, both at Common Law and by Statutes in England, as well as in this Province before the Union, and since by the Criminal Laws of the Dominion, and whatever may be the title of the Act, Consolidated Statutes chapter 38, although it may profess to be for the recovery of debts or for the enforcement of the payment of judgments, the Local Legislature cannot directly or indirectly make it a criminal offence, and punish in a summary manner by affidavits or testimony reduced to writing, and withdraw the protection which the Criminal Law casts around the person charged with such an offence. .

It is my opinion, and I think it very clear, that the B. N. A. Act, 1867, in the distribution of powers the Local Legislatures cannot legislate on criminal matters,—they may establish Courts of criminal jurisdiction,—but the proceedings in criminal matters in these Courts belong to the Dominion Parliament, and the proceedings to try the defendant for obtaining money, credit, or goods, which the recovery of a judgment was for, would belong to the Parliament of Canada to prescribe.

The second sub-section of 32: "The person making default had in incurring the debt or liability, in respect of which he has made default, obtained credit under false pretences or by means of any other fraud," is clearly a criminal offence, and comes within the Dominion Act, 32 and 33 Vict. c. 21, ss. 93 and 99, and the Local Legislature cannot, by engrafting such a section on an Act for the recovery of debts, give themselves the power to pass such

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an enactment; it clearly belongs to the supreme authority of the Dominion to legislate upon, and they have done so.

Then as to the remaining part of the said 2nd sub-section, "had incurred the liability by committing an act for the commission of which the person by the laws of the country where the same was committed, was liable to be proceeded against criminally." This part of the Act is not to be found in the original Acts to be consolidated, but has been added in the Consolidated Statutes. It is certainly new in legislation; it is not found in the Criminal Code of the Dominion, nor in any enactment that I can discover, or referred to in any text book. The Courts carefully avoid punishing a party for committing offences against the criminal laws of other countries. The object of Extradition Treaties and Acts are to send parties to the countries where the offence against these Criminal Laws has been committed, for trial; but I think no case will be found where a Legislature has assumed the power of trying the person in a summary manner for any offence against the criminal laws of another country: *Reg.* v. *Keyn* (1).

This part is certainly entirely new and opens to the Court a new field of enquiry, and vests in the discretion of this Court or a Judge to find the defendant, on a judgment in assumpsit, has been guilty of an offence or an act, for the commission of which in a country outside the limits of this Province, he may be proceeded against criminally in such country in a summary proceeding to find him guilty and imprison him with or without bail for the space of one year or until he pay a sum specified in the order of the Court or a Judge.

The Parliament of the Dominion has, in their Criminal Code, provided that any person who has in his possession property by any offence committed against the Criminal

(1) 40 L. J. M. C. 17; 2 Ex. D. 63.

(Act 32 & 33 Vict. c. 31, s. 121) Law, may be tried and punished in that part of the Dominion where he is found with the property. There is no Act in Canada or any of the Provinces where such an enactment can be found, to authorize the Court or a Judge, as in this Province, to try, convict, and punish a judgment debtor for an act committed in the State of New York, one of the United States of America, because he has rendered himself liable to be proceeded against, criminally, by the laws of such State, in incurring the debt. It only provides when the property is brought into the Dominion.

The Legislature of this Province in abolishing imprisonment for debt has, in directing in what cases a debtor, after final judgment, may be imprisoned, passed such an extraordinary clause in their Consolidated Statutes, which is at variance with the power delegated to them by the B. N. A. Act, and such claim is invalid and has not the force of law.

The ordinary process to arrest on a judgment has been abolished, and has substituted another enquiry into the cause of such liability, but the defendant is not permitted to open up the judgment—it stands against him; but the plaintiff opens the dealings and transactions upon which the judgment is obtained, of matters and things long anterior to the commencement of the action. The 33rd section allows application, *ex parte*, to be made for the order of the commitment. If made, the party, if committed without bail or the limits, has seven days' use of the limits to make application to have the order discharged, varied, or confirmed; or, if made upon summons, on hearing both parties on oath. The defendant could not get witnesses from the State of New York; no subpœna would reach them to compel their attendance. It being a criminal offence, the defendant could not be a witness unless the rules of evidence are to be subverted, and I presume it is

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the same in the State of New York; and I cannot suppose that it was the intention of the Legislature, by the language used, to reverse a maxim of our law as settled and as important as almost any other in it. For while the Legislature may pass laws relating to evidence in civil matters, it cannot by that have the power, directly or indirectly, of destroying the general rules of evidence appertaining to criminal procedure or *quasi* criminal procedure and proceeding, to enquire whether the defendant *Ellis* had incurred the liability by committing an act for which he would be liable to be proceeded against criminally in the State of New York, of which the learned judge must have had proof, to bring it within that category. The defendant then would not have been a competent witness to disprove the charge.

It was urged by Mr. *Barker* that there was no trial of the offence; but there was just such a trial as enabled the learned judge to declare that "both in such application and hearing, it having been proved to my satisfaction that the said *Thomas Ellis* incurred the liability, in respect of which he has made such default, by committing an act in the State of New York, one of the United States of America, for the commission of which the said *Thomas Ellis*, by the laws of the State of New York, was liable to be proceeded against criminally, I do order the said *Thomas Ellis*," etc. The Act does not require him to state the offence; but he finds just what the Act requires, which is, in effect, that *Thomas Ellis* is guilty of a criminal offence against the criminal laws of the State of New York.

It was also urged that the learned judge had found two facts—the party had the means of paying as well as being guilty of the offence against the criminal laws of New York. The learned judge stands upon the two facts. Had he stood on the one named in the 1st sub-

section, it might not have not been necessary, in his discretion, to imprison, without bail or limits, as the plaintiff might have obtained the fruits of his judgment by writ of *fi. fa.* or garnishee order upon the means which it was found the defendant had.

The warrant of commitment, as it appears by the papers used on this occasion, is for both facts found, and they are coupled together by the conjunction *and;* and if one is bad, both must fall: *O'Connell* v. *Reg.* (1).

I therefore arrive at the conclusion that the second sub-section of 32nd section of chapter 38 is beyond the jurisdiction of the Legislature to pass and is unconstitutional, and the judge's order being based upon the 1st sub-section and part of the 2nd sub-section, is invalid, the order being made upon both conjoined together. The rule should be made absolute for *habeas corpus* to issue.

Rule discharged.

(1) 11 C. & F. 155.

NEW BRUNSWICK SUPREME COURT.

1878*
March.

McMillan *v.* The Southwest Boom Company et al.

[*Reported 1 Pugsley & Burbidge, 715.*]

Navigation and Shipping—35 Vict. c. 44; 37 Vict. c. 107, N.B.

A Provincial enactment authorizing the erection of booms in a navigable river does not conflict with the power of the Parliament of Canada with respect to navigation and shipping under section 91 of the B. N. A. Act; the words navigation and shipping being employed in that section in the sense in which they are used in the several Acts of the Imperial Parliament relating to navigation and shipping, and in the Act of the Parliament of Canada, 31 Vict. c. 58, viz.: as giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion, and not as excluding for all purposes Provincial jurisdiction over navigable waters (1).

Trespass and trover tried before Mr. Justice Fisher at the Northumberland Circuit. The first count of the declaration in this case stated that before the committing of the grievances, etc., to wit, on the 1st May, 1874, there was and from thence hitherto had been a navigable river, or common highway, called the Southwest Branch of Miramichi River, for all the Queen's subjects to go and repass at their free will, and to float and drive down along the same their rafts, timber, deal and lumber; that before and at the time, etc., the plaintiff was lawfully possessed of divers rafts, and large quantities of timber, deals and lumber, and was floating and driving the same down the said river to market; yet the defendants wrongfully and injuriously put, placed and fastened a certain boom, and

* Present:—Allen, C. J., and Weldon, Fisher, Wetmore, and Duff, JJ.

(1) [See note, p. 551, *post.*]

divers piers, logs and lumber across the said river, and kept and continued the same closed and fastened across the said river for a long time, to wit, for five months thence next ensuing, and thereby during all the time aforesaid obstructed the said river, and thereby hindered and prevented the plaintiff from floating and driving his said rafts, etc., down the said river to market; by means whereof the plaintiff was hindered and prevented from selling and disposing of his said timber, etc., as he otherwise might, and the same, by reason of the great delay, became and was much deteriorated, and wholly lost to the plaintiff.

The second count stated the cause of action somewhat more generally, and alleged that by reason of the obstruction in the river the plaintiff was prevented from selling his deals and lumber for so good a price as he otherwise would have done and was put to great expense in taking care of the same, and it became much deteriorated and injured in value. There was also a count in trover for other lumber alleged to have been placed by the plaintiff in the defendants' boom.

The defendants appeared separately, each pleading not guilty, and leave and license.

The Southwest Boom Company was incorporated by an Act of the General Assembly, 17 Vict. c. 10. This Act was continued by 35 Vict. c. 44, and the powers of the company were extended by 37 Vict. c. 107. One of the questions raised in this cause was whether or not, as the Boom Company exercised large powers over a navigable river, the two latter Acts of the General Assembly of this Province were not *ultra vires*.

The Boom Company was incorporated "for the purpose of erecting such boom or booms, pier or piers, or any other works on the shores" of the southwest branch of the Miramichi river as they might think necessary or advi-

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sable at a certain specified part of the river, "for the more conveniently collecting, picking up, securing and rafting timber, logs and other lumber floating down the said river, and for carrying on and managing the same." The 4th section of 17 Vict. c. 10 declares that the "boom or booms shall be so constructed as to admit the passage of rafts and boats to preserve the navigation of the river."

A verdict was found for the plaintiff for $2,158 on the counts for obstructing the river, and for $95.00 on the trover count.

Oct. 15, 1875, Mr. *Weldon*, Q.C., moved for and obtained a rule *nisi* for a new trial (on the application of the Boom Company) on the grounds of misdirection and verdict against evidence; and (on behalf of *McLaughlin*) on the ground that he, at all events, was not liable on the trover count.

June 20, 1876, Mr. *Barker*, Q.C., shewed cause.

Mr. *Weldon*, Q.C., was heard in support of the rule.

A new argument on the question whether the Acts 35 Vict. c. 44 and 37 Vict. c. 107 were *ultra vires*, was subsequently ordered by the Court.

Oct. 11, 1877, Mr. *Weldon*, Q.C., in support of the validity of the Acts in question.

These Boom Companies have the right not only to erect booms, but they have the right to fasten them to the shores of the river. The latter are clearly civil rights and could not be given to the companies by any authority other than the Local Legislature. The Dominion Parliament has no power to incorporate a company with local objects; or to legislate concerning riparian rights. This power is in the Local Legislature, and the latter can exercise it, so long as the exercise of the rights and the franchises given does not interfere with the navigation of the

river. He cited *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (1); *Kearns* v. *The Cordwainers' Company* (2); *Lyon* v. *The Fishmongers' Company* (3); *The Attorney-General* v. *The Conservators of the River Thames* (4); *Attorney-General* v. *Terry* (5); and *Rose* v. *Groves* (6).

Mr. *Barker*, Q.C., contra.

There is nothing in this case, and no point in the argument, if the defendants have not interfered with the navigation of the Southwest Miramichi. The original charter, and the continuing and amending Acts must be taken to have been passed at the time of the continuing or amendment. The latter Acts were passed since 1867. By the B. N. A. Act, the Dominion Parliament have exclusive jurisdiction over "navigation and shipping." Must it not then be conceded that if in legislating it is necessary to interfere with the navigation of a river, that the necessary Acts must be passed by the Dominion Parliament which then has authority to legislate concerning civil rights to the extent required to make their legislation regarding navigation effective. Again the Boom Company's Acts may be good in part and bad in part. They may be good in so far as they relate to civil rights, and bad when they deal with the question of navigation.

Weldon, Q.C., in reply.

One legislature could not give to the company part of its powers, and another legislature another part. (Duff, J.: Could not the Dominion Parliament give certain rights to a company incorporated by the Local Legislature?) Perhaps so. The point here however is this; this company is incorporated for local purposes, it is a

(1) L. R. 5 H. L. 418.
(2) 6 C. B. N. S. 388.
(3) 1 App. Cas. 662.
(4) 1 H. & M. 1.
(5) L. R. 9 Ch. 423.
(6) 5 M. & G. 613.

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Argument.

local work, and the Local Legislature alone have power to incorporate it. The Dominion Parliament could not give the power to fasten booms to the bank.

Allen, C. J.:—

If the objection taken in this case—that the Local Legislature had no authority to pass the Acts 35 Vict. c. 44 and 37 Vict. c. 107, is valid, the plaintiff is clearly entitled to recover, as in that case the boom would be an illegal obstruction in the river, and the detention of the plaintiff's lumber entirely unauthorized.

This question depends upon the construction to be given to the words "navigation and shipping," in the 91st section of the B. N. A. Act, 1867, and to certain clauses of the 92nd section. If the right to authorize the erection of booms for securing lumber in the rivers of this Province comes under the head of "navigation," then undoubtedly it is one of the subjects over which the Parliament of Canada has the exclusive right of legislation, and the several Acts of the Provincial Legislature continuing the charter of the Boom Company, and authorizing the extension of its limits would be *ultra vires*. On careful consideration of the matter, I am inclined to think that the word "navigation" used in connection with "shipping," was not intended to have such a construction; but that it was used in the sense in which it is used in the several Acts of Parliament of Great Britain relating to "navigation and shipping," and in the Act of the Parliament of Canada 31 Vict. c. 58, viz.: the right to prescribe rules and regulations for vessels navigating the waters of the Dominion. It appears by the preamble of that Act, that such a law was in force in Canada previous to the Union, and therefore the delegates would necessarily have had the subject before them when they agreed upon the terms of the B. N. A. Act.

If this is not the proper construction of the word, would it not follow that the Local Legislature could not authorize the construction of bridges, in connection with the roads, over many of the smaller streams of the Province which are navigable for boats, or floating lumber at certain seasons of the year, because such bridges would to some extent obstruct the navigation of the stream; and also, that the Local Legislature could not authorize the erection of wharves along the shores of any of our rivers for the use of a vessel navigating them.

Let us look now to the 92nd section of the B. N. A. Act, and see whether any of its provisions apply to this case. It declares that the Legislatures in each Province may exclusively make laws in relation to matters coming within the classes of subjects thereinafter enumerated, and it states among others the following:—10th. "Local works and undertakings," (except of certain classes not applicable to this case); 11th. "The incorporation of companies with provincial objects." 16th. "Generally all matters of a merely local or private nature in the Province."

The Local Legislature therefore clearly has a right to incorporate a Boom Company, where its objects, as in this case, are entirely Provincial, and the erection of the boom, piers, etc., necessary for giving effect to such an Act of incorporation, are undoubtedly local works—necessary and useful only for this lumbering business in one section of the Province—the River Miramichi. The Acts, then, were entirely within the powers given to the Provincial Legislature unless the construction of the word "navigation" is as has been contended for by the plaintiff's counsel; for in that case the general power over all local works and undertakings must yield to the particular power given to the Dominion Parliament over the subject matter of navigation. But I think that is not the proper

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construction of the term, and therefore that the Acts in question are not *ultra vires*.

[The remainder of the judgment has no reference to the constitutional question, and is therefore omitted.]

Allen, C. J.

WELDON, J.:—

This was an action for obstructing the Southwest Branch of the Miramichi River, whereby the plaintiff was prevented from getting his lumber to market and was unable to perform his contracts. The jury, under the direction of the learned Judge, found a verdict (six to one) in favour of the plaintiff, for $2,000 and odd.

It appeared in evidence that the boom was erected under authority of the Provincial Legislature, 17 Vict. c. 10, the preamble of which states "Whereas the erection of a boom or booms on the Southwest Branch of the Miramichi River, in the County of Northumberland, would be a great benefit to persons engaged in the lumber business, by enabling them to secure timber, logs, and other lumber floating down the said river, at a moderate expense." The 1st section of the Act incorporates certain persons under the name of "The Southwest Boom Company" the 2nd section fixes the capital; the 3rd section, the organization of the company. The 4th section provides, "The boom or booms shall be so constructed as to admit the passage of rafts and boats, and to preserve the navigation of the river." Section 5 provides the time the boom is to be kept open. Section 13 "requires the company to have such boom erected within two years, and a certificate under the hand of the principal officer of the corporation, attested before a Justice of the Peace, and filed in the office of the Secretary of the Province, or the corporate powers shall be deemed null and void." The 14th section provides that nothing in the Act shall authorize the companies to enter on the land of any person

without their consent. The Act was to continue in force for ten years. It was subsequently amended by the Legislature, and was in force when the Confederation Act passed and remained so until 1872, when it was continued by the Local Legislature, and is still in operation.

It is the Act 35 Vict. c. 44, which it was contended contravened the B. N. A. Act, 1867, section 91, No. 10, of subjects enumerated as belonging to the Parliament of Canada,—"navigation and shipping." The defendants contended that the Local Legislature were authorized to continue the said Act authorizing the erection of a boom, and in the terms of the Act, and continuing the same was within the powers of the Local Parliament, and the boom was not illegally obstructing the river.

As to the boom being established by the authority of the Local Legislature in 1854, there is no doubt. It is the legislation of 1872 continuing the Act, which is called in question. The requirements of the Act of 1854 being performed is recognised by the Legislature in continuing the same, and by further continuing the same in 1872. The Act preserves the right of navigation, and there was no complaint that the boom had interfered with the navigation or infringed upon the rights of the public, beyond what was necessary to carry out the objects for which the Act was passed. It was, in my opinion, within the competency of the Local Legislature to continue the same in 1872 for a further period, and the doing so was no interference with the powers of the Dominion Parliament in regard to navigation and shipping.

It must be borne in mind that the Southwest Branch of Miramichi takes its rise wholly within the Province of New Brunswick, and unless there were navigable waters above, or that the Government of Canada had declared that this stream was necessary for the public

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works of Canada, the incorporation of this company would not interfere with the powers of the Dominion Parliament as defined in the words "navigation and shipping." It was simply a work rendered necessary for the safe keeping of lumber floating down that stream and its contributing branches, and in picking up, securing and rafting of logs, timber and other lumber floating down the stream. There was no evidence to shew that vessels ever passed up or down at the place where the boom is erected, or that there had been any interruption in passing of logs and lumber down the stream, other than was necessary for the safe keeping on ordinary occasions or freshets.

The Legislature having expressly authorized the erection of the boom by the corporation, and permitted such piers and booms to be erected and used for the securing of lumber floating down the said river, the company have only done what they were authorized to do; and if this interfered with the common law right of the plaintiff to have a free passage down the river for his lumber, the Legislature has restricted that right for the general benefit of all who lumbered on that stream, and to afford protection by the erection of such booms to the lumber floating down the river to prevent it from going to sea, or involving such heavy outlay in its preservation as to be equivalent to a total loss.

If the Local Legislature had not this power, while they provided for the non-interference with the navigation upon such stream, it would, in my opinion, interfere with the operation of lumbering on the various streams within the Province; and such could not have been the object of the B. N. A. Act. Navigation on the small streams where shipping does not frequent, and used only in the freshet seasons could not, I think, have been contemplated in using the term "navigation and shipping," used in the

distribution of powers of legislation, and consequently, I think, the Act to continue the original Act was within the legislative powers of the Local Parliament. (1)

[The remainder of the judgement has no reference to the constitutional question, and is therefore omitted.

[Wetmore, Duff and Fisher, JJ., concurred with the Chief Justice on the question of *ultra vires*.]

(1) [Since this case was put in print the Supreme Court of Canada has decided in *Davidson* v. *Queddy Boom Co.* that a Provincial Legislature cannot confer on a boom company power to obstruct a tidal navigable river. The judgment is not yet reported.]

NEW BRUNSWICK SUPREME COURT.

1882*
March.

IN RE RICHARD S. DEVEBER and J. S. BOIES DEVEBER, Insolvents.

EX PARTE THE BANK OF NEW BRUNSWICK.

[*Reported 21 New Brunswick Rep. 401.*]

Property—Insolvency—B. N. A. Act, s. 92, sub-s. 13—Con. Stat. N. B. c. 75, s. 1.

An Act of the Legislature of New Brunswick providing that, as against the assignee of the grantor, under any law relating to insolvency, a bill of sale should only take effect from the time of the filing thereof, was held to be within the competence of the Legislature.

This was an appeal from a judgment of the Judge of the County Court of the City and County of Saint John, under sect. 128 of the Insolvent Act of 1875. The appeal was made to Mr. Justice Palmer, and was by him referred to this Court.

Dr. *Barker*, Q.C., and Mr. *Harrison* for the appeal.

Mr. *Kaye*, Q.C., and Mr. *Weldon*, Q.C., contra.

The Bills of Sale Act, Con. Stat. c. 75, is *ultra vires* so far as it declares that a bill of sale shall not until filed have any effect against an assignee of an insolvent. It is a dealing with the question of insolvency which belongs exclusively to the Dominion Parliament.

Barker, Q.C., in reply.

There is nothing in the contention that the Bills of Sale Act is *ultra vires* so far as it relates to insolvency.

*Present:—ALLEN, C. J., and WETMORE, DUFF, WELDON and PALMER, JJ.

The Insolvent Act exempts from its operation property which is not subject to execution. The Local Legislature could pass an Act declaring that certain property which is now subject to execution should be exempt. This would be a dealing with the subject of insolvency quite as much as the Act relating to the registry of bills of sale.

PALMER, J.:—

The first question in this case is, when the goods and debts mentioned in the instrument set out in the case, dated the first of September, 1879, but really executed on the seventeenth, were transferred. It professes, in consideration of $40,000, paid the insolvents by the bank, to assign to the bank all the goods then in the insolvents' store, or that might afterwards be put in the store, and all book debts due the insolvents as security for the $40,000; and appointed the bank the attorney for the insolvents, to collect the debts and take possession and sell the goods and debts. No possession was taken by the bank. The insolvents stopped payment on the third of November, and this instrument was filed under the Bills of Sale Act on the fifth of November.

To decide this question, I will first have to consider whether the instrument is a bill of sale covered by the Bills of Sale Act (Consol. Statutes, c. 75). I think it will assist to determine this if we read the first section of that Act (1) by interpolating what bill of sale is defined by that Act to mean in lieu of the words, bill of sale. Doing

(1) Con. Stat. c. 75, s. 1: "Every bill of sale of personal chattels made after this chapter comes into force, either absolutely or conditionally, or subject or not subject to any trust, and whereby the assignee shall have power either with or without notice on the execution thereof, or at any time subsequent, to take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule annexed thereto or therein referred to, or a true copy of such bill of sale and schedule, shall be filed with the Registrar of Deeds

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this, the first section will read as follows: "Bills of sale, assignments, transfers, declarations of trusts without transfers, and other assurances of personal chattels, and also powers of attorney, authorities and licenses to take possession of personal chattels as security for any debt, etc., as against the assignee of the grantor, under any law relating to insolvency, etc., shall only take effect from the time of the filing thereof."

There can, I think, be no question but that according to this definition, this instrument is covered by the Act, and it follows as a matter of demonstration that it can have no effect in law until the fifth of November, when it was filed, if the Legislature that made that enactment had power to make such a law; and consequently then, and not until then, it could transfer any property or right of any kind as against the assignee of these insolvents. For if it did transfer any property, or altered or affected the assignee's rights in any way, it would then have some effect, the very thing the statute in plain words has declared it shall not have, and I am not at liberty to disregard those plain words from any supposed inconvenience, hardship, or injustice, even if I thought such existed.

This is the rule enunciated by the judges in the House of Lords in *Warburton* v. *Loveland* (1). The rule is "*Verbis plane expressis omnino standum, est.*" "Where," said Pollock, C.B., in *Miller* v. *Salomons* (2), "the mean-

and Wills of the County or District where the maker resides (and in case a copy be filed, the same shall be accompanied by an affidavit of the execution of the original bill of sale), otherwise such bill of sale, as against subsequent purchasers, the assignee of the grantor under any law relating to insolvency, or insolvent, absconding, or absent debtors, or an assignee for the general benefit of the creditors of the maker, or any sheriff, constable, or other person levying on or seizing the property comprised in such bill of sale under process of law, shall only take effect from the filing thereof."

(1) 2 Dow. & Clark, 480; 6 Bligh N. R. 1.

(2) 7 Ex. 475, 560.

ing of the statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right or the contrary. If the meaning of the language used by the Legislature be plain and clear, we have nothing to do but obey it—to administer it as we find it; and I think to take a different course is to abandon the office of judge and to assume the province of legislation."

If I am right thus far, it follows that there was no transfer of this property until the fifth of November, and it was then transferred, if transferred at all, as against the plaintiff; and the grantors assigned in insolvency on the twenty-second of November, only seventeen days thereafter, and they were hopelessly insolvent, and all parties knew it at that time. Then the 133rd section of the Insolvent Act of 1875 enacts: "That if any transfer be made of any property, etc., by any person in contemplation of insolvency, by way of security for payment to any creditors, etc., such transfer, etc., shall be void; and if the same (*i.e.* transfer) is made within thirty days next before a demand of assignment, etc., or at any time after when such demand is followed by an assignment, it shall be deemed *prima facie* to be so made in contemplation of insolvency."

If the Bills of Sale Act is in force, I am simply following the plain words of that statute in saying that the above is the effect of the instrument. It follows that such transfer is void *prima facie*. [The learned judge then, after stating that he refrained from citing the cases on the Imperial Bills of Sale Act, that Act differing entirely from the New Brunswick Act as regarded the point in the present case, continued, p. 424:]

But it is said that the part of our Bills of Sale Act that declares that it shall not have any effect as against the assignee of an insolvent is *ultra vires* the Local Legisla-

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ture. The considerations that I have already mentioned shew, I think, that there is nothing in such contention. The subject dealt with by the Local Legislature by such legislation is the right of property, in other words the interest, if any, acquired by the defendants by the bill of sale. As the law stood at the time of the passing of the Act, they would have acquired an absolute right against all the world to what they claim, and it became expedient to alter that law, and make such instrument inoperative in certain specified events, one of which is, if the grantor assigns in insolvency, or say, commits a crime. In both cases the power to create the crime, or compel the insolvency, is in the Dominion Parliament, and the question is, which is the proper Legislature to legislate on the subject of the right of property in the way I have mentioned.

The thing to be directly affected is the property of the defendants, a subject upon which the Local Legislature has by sect. 92, sub-s. 13, of the B. N. A. Act exclusive power to legislate, and the Dominion Parliament is given no such power expressly. The only power they can have to affect that subject is what they may do as incident to the exercise of their power to legislate with reference to subjects mentioned in section 91, one of which is insolvency.

This incidental power is in derogation of powers exclusively given to the Local Legislatures, and only given by implication and *ex necessitate rei*, and therefore must be confined strictly to such necessity, and perhaps the Act can present no more difficult subject for construction than where to draw that line of necessity. Lawyers attempting this must always be met with the difficulty that they are, to some extent, allowing the Dominion Parliament to exercise legislative powers that are by the express words of the Act, not only given to another legislative body, but given to it exclusively.

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Chief Justice Ritchie, in *Valin* v. *Langlois* (1), says: "But while the legislative rights of the Local Legislatures are in this sense subordinate to the right of the Dominion Parliament, I think such latter right must be exercised so far as may be consistently with the right of the Local Legislatures; and therefore the Dominion Parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada."

Even if this power to legislate so as to affect the right of property does not exist in both Legislatures concurrently, I cannot see how a law made for the protection of creditors and *bona fide* purchasers against secret bills of sale, allowing them to have full force against parties making them, but of no effect in case of an assignment in insolvency or otherwise, could so prevent the Dominion Parliament legislating generally and effectually on the subject of insolvency, as to prevent the Local Parliament legislating on the subject so exclusively and expressly given them.

This law, as I before pointed out, has made a bill of sale, not registered, defeasible by several conditions subsequent, and that is all the right the bank ever had under it, or the grantor ever transferred. The rest remained in him, and would be in him even if it were not for the sixteenth section of the Insolvent Act of 1875, which enacts that all the rights of an insolvent are vested in the assignee in the same condition as he had them himself; and when one of the conditions happened which defeated the bank's right to the property, and made it revert to the insolvent, it was transferred by force of the section to the assignee. This in my opinion was a legislation by

(1) 3 Can. S. C. R. 1, 15; *ante*, vol. 1, p. 172.

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the Dominion Parliament that would give the plaintiff a right to this property.

It must also be borne in mind that the Insolvent Act gives the assignee the rights of the insolvent's creditors.

I have thought best to put my decision on the Bills of Sale Act, but I fully agree with the majority of the Court, that the instrument could not be supported, even if the Bills of Sale Act had been complied with on several grounds (1).

[The remainder of the judgment of Palmer, J., is occupied in discussing these other grounds, and has no reference to the constitutional question.

[Allen, C. J., and Wetmore and Duff, JJ., concurred in holding that the Bills of Sale Act was not *ultra vires*, but did not deliver separate judgments on this point.

[Weldon, J. did not consider that the Bills of Sale Act in any way affected the case, and did not express any opinion respecting it.] (1)

(1) [See also *In re* Richard S. De Veber and J. S. Boies DeVeber, Insolvents, *Ex parte* Leverett H. De Veber, Petitioner, (21 New Brunswick Rep. 397), where it was held by Allen, C.J., and Wetmore and Duff, JJ., Weldon, J., dissenting, that the Bills of Sale Act was not *ultra vires*, and was not legislation on the subject of insolvency, within the meaning of the B. N. A. Act. Palmer, J., was inclined to agree in the view of the majority of the Court.]

ONTARIO COURT OF APPEAL.

THE ATTORNEY-GENERAL *v.* THE INTERNATIONAL BRIDGE COMPANY.

1881*
May 19
Nov. 28.

[*Reported 6 App. Rep. 537.*]

Attorney-General of Ontario—Locus standi—Specific performance of Acts of Parliament.

An Act of the Dominion Parliament, incorporating a company for the purpose of constructing a bridge across the Niagara River from Canada to the United States, directed that the bridge should be "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The bridge was completed for railway purposes only; and the time limited by the charter for completing the work having elapsed, an information was filed in the name of the Attorney-General of Ontario seeking to enforce the terms of the charter, or for the removal of the bridge as a nuisance:

Held, by the Court of Appeal reversing the decision of Spragge, C., that, the bridge as constructed not being a public nuisance, the Attorney-General of Ontario was not the proper officer to file the information.

This was an appeal from the judgment of Spragge, C., reported in 28 Grant 65, *post*, p. 568.

The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States, across the Niagara River, which was to be as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a

*Present:—BURTON, PATTERSON, and MORRISON, JJ. A., and OSLER, J.

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railway company to which the bridge had been leased, until put in condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission for its use by foot passengers on payment of the statutory tolls. The bridge, owing it was said to engineering difficulties, could not be adapted to the use of carriages and foot passengers.

On May 19th, 1881, the appeal was argued.

Mr. *E. Blake*, Q.C., and Mr. *Walter Cassels* for the appellants.

The Chancellor erred in giving any relief at the instance of the Attorney-General for the Province of Ontario. The defendants, the International Bridge Company, are a corporation incorporated by the laws of the Dominion of Canada. They are also a corporation incorporated by the laws of the United States of America. The bill, in effect, is a bill praying specific performance against the defendants, the International Bridge Company, of their Act of Incorporation. The informant alleges that the defendants have completed a portion of the structure as required by the Act of Parliament, but the complaint is that they have not fulfilled all the conditions required by the Act, because they have not constructed a carriage-way or a footway. There is no objection to the form of the structure so far as it has been completed, but the objection is on the ground of the non-completion of the whole of the structure. The Attorney-General for the Province of Ontario has no jurisdiction to pray for the fulfilment of obligations created by the Dominion Charter, and by the Act granted in the United States. This bridge, by the Confederation Act, is a structure within the sole control of the Dominion, and if an information would lie at all, such information can only lie at the instance of the Attorney-General for the Dominion of Canada.

There are numerous reasons why such jurisdiction should not be exercised by the Attorney-General for the Province of Ontario. It might lead to serious international complication with the United States of America if the decree of the Chancellor were enforced. Assume that the defendants did not comply with the decree, what is the result? The prayer of the information asks that the bridge should be removed, and a decree to be carried out would require to be supplemented by an order declaring the bridge to be a nuisance and removing it. The prayer of the information asks this relief. There is a marked difference between this case and that of a completed structure and an information being filed merely to protect the rights of the citizens of Ontario, such as the *Attorney-General* v. *Niagara Falls Bridge Co.*, (1) where the information did not seek in any way to affect the structure as completed, but merely sought to prevent the defendants from preventing people from crossing. In this case no relief can be granted unless the structure is altered so as to comply with their charter, and these appellants submit that the Attorney-General for the Province of Ontario has no status to apply for any such relief. The bridge is not constructed upon lands belonging to the Province of Ontario, but is solely within the jurisdiction of the Dominion of Canada.

There was an improper exercise of the discretion of the Attorney-General in signing such an information, if such right existed. The information alleges that the bridge is a public nuisance; that it stops the navigable waters of the River Niagara; and the information prays the removal of the structure, so that the nuisance may be abated. The evidence conclusively and clearly shews that instead of the bridge being a nuisance, and being a source of inconvenience to persons resi-

(1) 28 Grant 34; *ante*, vol. 1, p. 813.

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ding at or near the bridge, and instead of its being a public nuisance, as stated in the information, it confers large and great advantages upon the people of Ontario, and it would be a public calamity if the information of the Attorney-General were granted and the bridge were removed, and for this reason also the information should have been dismissed. The evidence also shews that the information is not granted in the public interest, but is solely granted in order to benefit the relator, Robert George Barrett; and that there is therefore no ground whatever on which the granting of the information can be justified.

There is no jurisdiction in the Court of Chancery to make the decree which the learned Chancellor has made. The evidence discloses the fact that it would be unsafe to permit foot-passengers to cross the said bridge. It also appears from the evidence that the said bridge is not a continuous structure across the River Niagara, and even if the Attorney-General for Ontario has any right to sue, and if the Court of Chancery has any jurisdiction to grant a decree, such decree could only affect the bridge so far as the said bridge is within the Dominion of Canada. It appears from the evidence that the said bridge is only constructed as far as Squaw Island; that across Squaw Island the said bridge is built upon an embankment. It would be impossible to construct a footway across Squaw Island without building up an embankment and allowing foot-passengers to cross on the embankment. Therefore the decree of the Chancellor would only affect the bridge company so far as the bridge extended, viz., until it reached Squaw Island; but the evidence shews that such a footbridge would be of no use whatever, and nothing is gained by such a decree, and the appellants, therefore, submit that such a decree should not have been made. Looking at the evidence in the case, it appears that a large sum of money has been expended in the construc-

tion; the bridge is of great public value, and the Court should not interfere. Bonds also have been issued charged on the bridge, and statutes passed recognising these bonds as valid securities, and the Court should not interfere with the rights of the bondholders.

Mr. Maclennan, Q.C., and Mr. *McCarthy*, Q.C., for the respondents.

The decree of the Court of Chancery is right so far as it grants relief to the informant, but it should have gone further, and should have granted relief in respect to the adaptation and use of the bridge for ordinary carriages as well. By the Act of Incorporation of the company it is declared that the bridge should be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains. See 20 Vict. c. 227. By a subsequent Act, 22 Vict. c. 124, s. 2, the intention of the Legislature in this respect is repeated, and it was evidently contemplated that as soon as it was ready for railway trains it would also be fit for ordinary foot and carriage traffic. By the Act 35 Vict. c. 63, s. 2, D., authorizing and legalizing the lease to the Grand Trunk Railway Company, the rights and privileges of the public in respect to the use of the bridge were expressly saved. The agreement between the bridge company confirmed by the last mentioned Act and set out in the schedule thereto, recites that the bridge is to be both a railway and carriage bridge—See the recital, p. 239, Stat. of Can., 1872,—and therein the bridge company covenants, sec. 2 of the agreement, p. 250, to construct and complete a railway carriage bridge with a carriage and footway. It is clear, therefore, that the bridge authorized by the Legislature was for the use of the public on foot and in carriages, as well as for railways, and it is equally clear that the bridge company covenanted with the railway company

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to construct that sort of a bridge. It appears further that the contract, under which the bridge was built, made express provision for the floors and fixtures, necessary to make it a railway, carriage and foot bridge, and also to complete the carriage and footway across Squaw Island, and it was provided that it should be ready for traffic on the 1st of January, 1872, and that the carriage and footway should be ready on the 1st of July afterwards. See the contract with Messrs. Gzowski and Macpherson of 19th May, 1870. This contract was confirmed by another, dated 1st January, 1872, without any alteration of the provisions as to the carriage-way and footway. Mr. Gzowski, in his evidence, proves that the bridge was constructed under these contracts, and no other. These contracts were first produced and seen by the informant at the trial. The plans and specifications which should have been annexed to them are not produced by the defendants or accounted for. If they had been produced, they must have harmonized with the body of the contract and have exhibited a roadway adapted both for railway and ordinary carriage traffic, and it is evident that the intention and design were that the same roadway should be adapted for use by railways, common carriages and foot passengers. It is proved by the evidence that the roadway could readily and at moderate expense be planked, so as to be adapted to carriage and foot traffic as well as railway traffic. See particularly Mr. Gzowski's and Mr. Spicer's evidence, as well as the evidence for the informant generally.

The case then is, that the bridge was authorized by the Legislature and constructed by the company as a public highway, with this difference from the ordinary highways of the country, that it might be used by railways also. The railway company has monopolized the use of the highway to the exclusion of the public altogether. The defendants

accomplished this by refusing to put down the necessary planking for carriage traffic, and by refusing to allow pedestrians to enter the bridge at all. It is objected that the Attorney-General of Ontario cannot maintain this suit, but the contrary was decided in *Attorney-General* v. *Niagara Falls Bridge Co.*, (1) which has always been followed since, and has never been questioned.

Blake, Q.C., in reply.

BURTON, J. A. :—

The information in this case is based on the assumption that the bridge, not having been constructed in conformity with the requirements of the Act of Parliament authorizing its construction, is not the structure authorized by the Legislature and a nuisance, and the principal prayer of the information is directed to obtaining the decree of the Court to abate the nuisance and remove the structure from the navigable waters of the Niagara River, and I do not for a moment doubt the right of the Attorney-General for Ontario to represent the public in any such case, either in equity or by prosecution at law. There is abundance of authority for informations directed to the repression of acts which the parties had no legal right to do, and which were not only not authorized to be done, but were in fact acts of public nuisance. If, for example, the company had proceeded to build one of the piers and had then abandoned the work, there could be no question of the right of the Attorney-General to prefer an indictment for a nuisance, or to take such other proceedings as he might find most expedient to guard the public interest; but the decree is not based upon that prayer of the bill, and although the argument was faintly renewed before us that the bridge, not having been completed so as to

(1) 20 Gr. 34; *ante*, vol. 1, p. 813.

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serve all the purposes referred to in the Act is a nuisance, it is perfectly manifest, for the reasons stated by the learned Chancellor, that that contention cannot prevail. The piers, which alone could constitute the impediment to the free navigation of the river, are not complained of, and the main structure, that is the bridge for the conveyance of trains has been built in a manner which is shewn to be admirably adapted to this purpose; and to hold that such a structure, which has been put up at an enormous expenditure of skill and money, and upon which the Legislature has authorized a debt of several hundred thousand dollars to be charged, could be abated as a nuisance, because the company has omitted or refused to complete some portion of the structure intended for the use of carriages and foot-passengers, and not in the slightest degree affecting the navigation of the river, would be a reflection on the administration of justice. The fallacy consists in calling the abandonment of a portion of the work a public nuisance, instead of, what it probably is, an abuse of the Act of Parliament.

If the information had contained only such allegations as those upon which the decree is based, omitting all reference to the structure being a nuisance, and confining its prayer to the relief now granted, I apprehend it would have been demurrable, both on the ground that no contract with the public is shewn, and because the Attorney-General for Ontario, who can represent only a limited portion of the public with whom, if at all, such a contract exists, has no *locus standi* on such an application.

The work is one within the jurisdiction of the Government and Parliament of Canada. That Parliament, presumably with the knowledge that it was only completed for railway traffic, has nevertheless recognised it, and allowed a large amount of debentures to be issued and charged upon it, and upon which therefore the holders rely

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for repayment; and it may be that the Attorney-General of the Dominion, acting for the Crown, is not disposed to exact this further performance, or may be prepared to recommend the passage of a bill to dispense with it. It would be a strange anomaly if, notwithstanding this being the feeling of the Dominion authorities, a bill could be filed by the Attorney-General of the Province seeking in effect to compel the specific performance of this Act of Parliament. Regarded therefore in that light, I am disposed to think the Attorney-General of Ontario is not the proper party to file this information.

But I am of opinion that no grounds have been shewn for the interference of the Court. It is now perfectly well established, since the decision of the Exchequer Chamber in *York & North Midland R. W. Co.* v. *The Queen* (1) that Acts of this description are not to be regarded, as they had come to be regarded, as contracts; that they are what they profess to be and nothing more; they give conditional powers which if acted upon carry with them duties. Statutes may be so framed as to render it obligatory upon the companies to proceed with the works, but that is not so in the present case; the words of the Act are simply permissive; nor is there, in my opinion, anything in the argument that although originally permissive it ceased to be so and became obligatory when once begun. Suppose the company had constructed the footway as the least expensive portion of the work, and then finding the railway bridge too expensive had abandoned it, could it be contended with any force that the shareholders should, at a ruinous loss to themselves, proceed with its construction? Yet that must follow, if this argument be sound.

It would have been a very different matter if the works had been fully completed. I do not for a moment doubt

(1) 1 E. & B. 858.

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that in such a case a company could be compelled by a mandamus or decree of this Court fairly and fully to carry out the objects for which they were created: *Rex* v. *Severn and Wye R.W. Co.* (1).

For these reasons I think this decree cannot be supported, for I assume the fact to be, not that a footway for passengers has been made, but that parties can manage to pass on foot by the side of the track, and that that portion of the bridge has not been completed any more than the carriage-way in compliance with the Act of Parliament. But I think that independently of these considerations it is manifest that the jurisdiction of this Court to grant relief cannot extend beyond the limits of the Province, and it being a fundamental principle of the law of mandamus, as well as of injunction, that it will never be granted in cases where if issued it would prove unavailable, there could be no object in giving the right to pass over the bridge as far only as Squaw Island; and if for no other reason this Court should not interfere.

I am of opinion, therefore, that the appeal should be allowed, and the information dismissed, with costs.

PATTERSON and MORRISON, JJ.A., and OSLER, J., concurred.

Appeal allowed.

JUDGMENT IN COURT OF CHANCERY.

[*Reported 28 Grant 65.*]

SPRAGGE, C. :—

This information complains of the construction of the International Bridge, in its not being so constructed as to admit of its use by ordinary vehicles, in that respect not being such a bridge as the company, by their Act of Incorporation, were authorized to construct, sect. 19 of the Act enacting "that the said bridge shall be as well

(1) 2 B. & A. 646.

for passage of persons on foot and in carriages and otherwise as for the passage of railway trains." In paragraph 17 the complaint is that the defendants have not constructed a carriage way, and refuse to construct any way, means, or convenience for the passage over the bridge by persons in carriages. Paragraph 20 alleges that there are no serious engineering difficulties in the way of the company complying with the requirements of the Act in that respect; and paragraph 21 alleges that "the existing bridge is so constructed that with little comparative expense the same could be adapted to permit of passengers using it in ordinary carriages as well as by railway trains."

In respect to this branch of the case, I may say at once that the allegations contained in paragraphs 20 and 21 (1) are not supported by the evidence, but on the contrary, it is shewn by the best evidence that what is alleged and what is suggested in these paragraphs is altogether incorrect.

To the relator, indeed, it seemed, as appears by that gentleman's evidence, that what is suggested is perfectly feasible; but he does not profess to be scientific, or to be at all conversant with the working and management of railways. Col. *Gzowski*, a civil engineer of great ability and experience, and a man eminently practical, and by whom the bridge in question was built, is called for the relator, and pronounces emphatically against the plan proposed by the relator as a solution of the difficulty; and shews how it is that it is impracticable.

It appears from Col. *Gzowski's* evidence, and from that of Mr. *Hannaford*, the engineer at the bridge, that the bridge was built for railway traffic only, and that the plans and specifications by which it was built shew this. That it should have been built for the use of passengers in carriages and on foot, as prescribed by the Act, as well as for railway traffic, must I think, be conceded; but it has not been so built; and there are two very sufficient reasons why the present structure cannot, as it is, be used, and cannot be adapted to that purpose. One is, the engineering difficulties in the way of its being so used or adapted; the other is, that the railway traffic is so

(1) These paragraphs were as follows: "20. There are no serious engineering or other difficulties existing to prevent the said defendants from complying with the said Acts in constructing the said bridge so as to admit of the passage of persons in ordinary carriages as well as on foot over the same. 21. The existing bridge is so constructed that with little comparative expense the same could be adapted to permit of passengers using it in ordinary carriages as well as by railway trains."

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great that the bridge could not be used for both carriage and railway traffic, especially when the interruption to traffic by the raising of the drawbridge for the passage of vessels is taken into account. From ninety to one hundred and forty trains pass over the bridge daily; the number of cars attached to the trains being from five to thirty to each train. Mr. *Hannaford* puts the case thus: If the railway had the right of traffic it would rarely be possible to use the bridge for ordinary carriages; while if ordinary carriages had the right of traffic, it would amount to closing the bridge for railway traffic. The evidence of Col. *Gzowski* and Mr. *Hannaford* is confirmed by that of Mr. *Spicer*, the general superintendent of the Grand Trunk Railway Company, and is, I think, conclusive upon that point.

Against this I have no scientific evidence whatever, nor have I the evidence of any one conversant with the working of railways to controvert the evidence of the gentlemen called upon this point by the defendants. Upon the evidence before me I feel that to direct what is asked upon this head would be directing that which is impracticable. No evidence is given of the extent to which the bridge would be used if opened for use by carriages; but I take it that it would be of very trifling importance compared to the importance of its use for railway traffic.

The information asks, besides the relief to which I have adverted, that the defendants be ordered to abate what it styles a nuisance, i.e., to remove the bridge, the present structure, from the navigable waters of the Niagara river, unless the same is made to conform to the requirements of the Act.

The present structure cannot be made to conform to the requirements of the Act, and it is not shewn that it is practicable to construct a carriage way under it (as is done in the case of the suspension bridge below the Falls of Niagara), or beside it, or appended to, or connected with it in any way; or that the defendants, or any of them, have the pecuniary means or the legal authority at this time to make such a structure; or that it is a work the execution of which this Court or a Court of Common Law, by *mandamus*, would direct. Such a direction as is asked would be at once fatuous, in the sense of being impotent, without force, illusory, and futile, as well as most mischievous in its consequences. It is not at any rate now an open question. The like application has been negatived more than once in this Court, and if it were before me now for the first time I should certainly refuse to make such a decree.

I come now to another branch of the case made by the information. Paragraph 15 alleges that the bridge, constructed as it is, is adapted to the use of foot passengers; and paragraph 17 says that although the bridge is adapted thereto, and although the defendants use the footway of the bridge for their servants and employees to cross and recross, they refuse to allow the use thereof and they prevent persons on foot from crossing the bridge, although willing and offering to pay the lawful tolls provided by the Act. There is no question that the defendants do not permit the use of the bridge to foot passengers; their granting passes is exceptional; they say that the bridge is not adapted for use by foot passengers, and this is probably correct in the sense that it was not constructed with a view to its being used by foot passengers; but there is a space between the track and the outside railing of the bridge, which is used by the servants of the defendants in passing to and fro, affording more than sufficient space, when trains are not passing, for its use by ordinary foot passengers; but some of the cars used with these trains are of such width as to diminish the space on each side to some three feet six inches; and the space is further practically diminished by the oscillation of the cars when in motion to the extent of about six inches. So far as space is concerned, there would still be sufficient room for the use of the bridge by passengers in single file, even when abreast of the widest cars, and those cars in motion.

What, then are the difficulties in the way of the use of the bridge by ordinary foot passengers, and do the defendants shew any sufficient reason for preventing such use?

The difficulties set up by the defendants, as disclosed in evidence, are not that they, the defendants, would have any serious difficulty in allowing the use of the bridge to foot passengers, or that such use would at all interfere with railway traffic. The difficulty consists rather in apprehended danger to the foot passengers themselves. Col. *Gzowski*, Mr. *Hannaford*, and Mr. *Spicer*, all speak of it as a "nervous thing" to cross the bridge; Mr. *Spicer* as "confusing" to cross while trains are in motion on the bridge; Mr. *Hannaford* as "dangerous" from the effects of the wind, which he says is at times so violent on the bridge that a person could not keep his legs without holding on to something.

On the other hand, the relator speaks of crossing as unattended with difficulty, and *Richard Hinton* and *Henry Emrie*, residents of the village of Victoria, on the Canada side of the river, say that they have often crossed the bridge; that it is safe to do so; and

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Emrie says safe on the darkest night. I can readily understand that in the case of a nervous person crossing while a train is in motion, or in very boisterous weather, it would be confusing, and not unattended with danger; but one great reason of this no doubt is, that there is no fence or protection of any kind between the track and the outside railing of the bridge. Mr. *Hannaford*, who was examined upon this point, says that a fence might be made between the track and the outside railing, and tools made to work inside the fence, the present tools being long for the purpose.

This evidently would diminish the danger; and the sense of security—from the fact of the fence being there—would diminish the nervous apprehension of danger, which is itself often a source of danger. I take it that the reason why no fence has hitherto been placed where Mr. *Hannaford* says a fence might be placed is not far to seek. I take it to be that the defendants have wished to discourage the use of the bridge by foot passengers because of the risk of accident to those crossing; and that, therefore, so far from affording facilities for crossing, they would prevent it in all but exceptional cases; and if the bridge were a private enterprise, with proprietors having a right to do with it as they pleased, no one could blame them for not allowing its use to foot passengers otherwise than according to their own regulations. But that is not the position of the bridge company, or of those having authority to exercise the powers committed to the bridge company by the Legislature. The company was not authorized to build whatever kind of bridge it might think fit, but the Act directed that the bridge to be built should be a bridge "as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains." That was the duty cast upon the company by the Legislature if the company built the bridge; and so far as the bridge built by the company fell short of the requirements of the bridge authorized by the Legislature, so far has the company failed in the duty cast upon it.

For reasons already explained in this and other cases, the general public is without remedy in the Courts, so far as a carriage way is concerned, but the structure built by the company although not built as it ought to have been for the use of foot passengers, is yet as it is not altogether unfit for that purpose, and it is practicable, and is not even difficult, for the company to render it now reasonably fit for use by foot passengers. The company is not excusable in not having built such a bridge as alone they had authority to

build ; and they are altogether without excuse in not having adapted the structure they have erected, as far as it is possible to adapt it, to the use of foot passengers ; subject, of course, to any reasonable regulations the defendants may make in regard to its use.

What has been their duty in this regard, is their duty now. My own idea of what is proper is that a very strong fence should be built, at such a distance from the track as to be beyond the oscillation of the Pullman cars, which are, I believe, wider than ordinary passenger cars ; and I myself see no reason why this should not be done on each side of the track. As to these points, however, I will, if either party desires it, direct that an expert shall examine and report upon what is feasible and proper ; or refer it to the Master to do so.

It may be that after all is done that can be done for safety, the crossing of the bridge by foot passengers, will not be altogether unattended with danger, especially to those of a nervous temperament ; but the danger is not of such a character as to warrant the bridge company in preventing the use of the bridge by foot passengers, and in failing to use all proper appliances for their safety in crossing, or of such a character as to make it proper for this Court to refuse to interfere, and to require the defendants to do what, as far as it can be done, they were bound to do under their Act of incorporation for the convenience of the general public.

It was objected at the hearing that the Attorney-General of Ontario is not the proper party to file this information, but that if any one it should be the Attorney-General of the Dominion. To a certain extent that point was disposed of by Mr. Justice *Strong* in *Attorney-General* v. *Niagara Falls Bridge Company* (1), where the propriety of such an information by the Attorney-General of the Province was put by the learned Judge upon this ground : "The Attorney-General files this information, not complaining of any injury to property vested in the Crown as representing the Government of the Dominion, but in respect of a violation of the rights of the public of Ontario." So far, therefore, as the prevention of the public to cross on foot is concerned it is a violation of the rights of the public of Ontario ; but it is objected that the Courts can go no further at the instance of the Provincial Attorney-General ; that the Court cannot direct any work to be done on the bridge ; that that can only be obtained upon information filed by the Attorney-General

(1) 20 Gr. 34, 37 ; *ante*, vol. 1, p. 813.

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of the Dominion; in other words, that although a fence upon this bridge may be necessary for the safety of the public using the bridge, the use of which is a public right which the defendants have violated, the Attorney-General, who is the proper officer to represent the public to vindicate this public right, cannot be heard to point out the mode in which he conceives the safety of the public in the exercise of its right ought to be secured. Or it may be put thus: The Attorney-General having shewn upon this information that the defendants refuse to the public the exercise of a right in respect of which the Attorney-General is the proper officer to represent that public, the Court must content itself with a direction that the defendants shall not interfere with the public in the exercise of that right, and is powerless to go further, and to prescribe by what means the safety and convenience of the public are to be secured in the exercise of that right. It is not suggested that any right of the Crown, as represented by the Government of the Dominion, would be interfered with, or that the bridge would be injured by the doing of that which I propose to direct. The power to make such direction is incident, as I conceive, to the power to direct the defendants to permit the exercise of the right, and it may be assumed that the presence of the Attorney-General of the Dominion is not necessary to prevent the Court from making an order prejudicial to the rights of the Crown in the Dominion while vindicating, at the instance of the proper officer, the right of the public in the Province.

It is not objected in this case, by answer or in argument, that the defendants have not such control of the bridge as to enable them to carry out what this Court might direct in regard to the exercise of the right of foot passengers to cross the bridge.

I do not myself entertain any doubt of the right of this Court to make such a decree as I propose to make. Of the right to enjoin the defendants from preventing the use of the bridge by foot passengers there can be no doubt, and, in my opinion, the Court has jurisdiction to go further. Without putting it upon the ground upon which it was put by *Strong*, J., in *The Attorney-General* v. *Niagara Falls Bridge Company* (1), the execution of trusts and the fulfilment of contracts, it is, in my judgment, a case in which a proper remedy, not to say the proper remedy, is by *mandamus*.

I have held, in *Marsh* v. *Huron College* (2), that this Court has

(1) 20 Gr. 490. (2) 27 Gr. 605.

jurisdiction in all cases in which *mandamus* is the proper remedy, and that in dealing with such cases the Court will, ordinarily at any rate, take cognizance of them by its usual course of procedure. I refer to that case without repeating the reasons which led me to that conclusion.

I think the proper course as to the disposition of the costs is to direct that each party pay his own costs.

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ONTARIO COURT OF APPEAL.

1882*
Feb 13;
June 30.

REGINA *v.* FRAWLEY.

[*Reported 7 App. Rep. 246.*]

Hard labour, power of Provincial Legislatures to impose punishment of—B. N. A. Act, s. 92, sub-ss. 8, 9.

A Provincial Legislature has power to enforce any of its laws by imposing hard labour as a punishment for the violation of them.

Per Spragge, C.J. : The jurisdiction of a Provincial Legislature to legislate respecting licenses is not confined to the object of raising a revenue.

In this case the defendant, Thomas Frawley, had been convicted by Thomas McCrae, Esquire, Police Magistrate in and for the town of Chatham—

"For that he, the said Thomas Frawley, on the 28th day of December, 1880, at the town of Chatham, . . . unlawfully did keep manufactured liquors at his house in the said town of Chatham, for the purpose of selling, bartering, or trading therein, without the license therefor by law required; and it appearing to me that the said Thomas Frawley was previously, to wit, on the 4th day of April, A.D. 1877, at the said town of Chatham, before me, Thomas McCrae, Police Magistrate in and for the town of Chatham, in the said county, duly convicted of having on or about the 27th day of March, A.D. 1877, at a house of entertainment kept by him, the said Thomas Frawley, in the said town of Chatham, unlawfully kept spirituous liquors for the purpose of selling, bartering, or trading therein, without the license therefor by law required, I

*Present :—SPRAGGE, C.J., and BURTON, PATTERSON and MORRISON, JJ.A.

adjudge the offence of said Thomas Frawley, hereinbefore firstly mentioned, to be his second offence against the 'Liquor License Act' (Israel Evans being the informant), and I adjudge the said Thomas Frawley, for his second offence, to be imprisoned in the common gaol of the county of Kent, at Chatham, in the said county of Kent, there to be kept at hard labour for the space of three calendar months."

The defendant thereupon moved before the judge of the County Court of the County of Kent, to quash such conviction, which was refused, and the conviction affirmed, with costs.

The defendant thereupon obtained a writ of *certiorari*, to return the several papers and proceedings to the Court of Queen's Bench, and in Easter Term 44 Vict., (on the 25th of June, 1881), that Court ordered the conviction to be quashed (1).

The Crown thereupon appealed to this Court, and the case came on for argument on the 13th of February, 1882.

Mr. *Mowat*, A.G., Mr. *Robinson*, Q.C., and Mr. *Hodgins*, Q.C., for the appeal.

Mr. *McMichael*, Q.C., contra.

It was contended for the appellant that the Act in question was *ultra vires* of the Provincial Legislature of Ontario, and that the Provincial Legislatures had power to enforce their laws by imposing hard labour; that the power of imposing hard labour did not depend on the 15th Article of the 92nd section of the B. N. A. Act, it being contained and included, also, as well in the power of Provincial Legislatures to deal with all civil rights, as in the implied and incidental power of selecting and adopting, at their own discretion, and according to their own judgment, whatever means they from time to time think best

(1) 46 U. C. Q. B. 153; *post*, p. 596.

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for enforcing laws on every subject within Provincial jurisdiction; that the 15th article was not intended to restrict Provincial Legislatures to imprisoning in idleness; it does not limit the imprisonment in regard to either time or the employment of the prisoners; as it does not restrict in any way the fines and penalties to be imposed. The use of the word "imprisonment," and of like words to imply and include hard labour where hard labour is not expressed, is not without example in British and Canadian statutes. That this was the meaning intended by the 15th article appears from the considerations above mentioned; and also from the history, objects, and uses of requiring labour from prisoners; the course of British and Provincial legislation on the subject prior to the passing of the B. N. A. Act; the state of such legislation at the time of the passing of that Act; the powers which even municipal councils and other local bodies in Canada then and long before possessed to impose hard labour on offenders against their by-laws; the special character of the B. N. A. Act as a Constitution; and the nature and extent of the legislative powers assigned thereby to the Provinces; and of the legislative powers which the Provinces possessed on the same subjects up to and at the time of Confederation.

On behalf of the respondent, it was insisted that the Provincial Act, under which the defendant had been convicted, in so far as it imposed hard labour, was *ultra vires* of the Provincial Legislature of Ontario; that the Province succeeded to no power and could possess none except such as was expressly conferred by the Confederation Act, which reserved the right to the Dominion Legislature to make laws respecting all matters not expressly designated as within the powers of the Provincial Legislature; that section 92, clause 15, B.N.A. Act, expressly limits the quality but not the degree of punishment for

infringing laws within the powers of the Provincial Legislature; and that "hard labour" was not within the contemplation of the clause; and that even if it were within the nature of the punishment, it could not be enforced for an infraction of the Liquor License Act, which is *ultra vires* of the Provincial Legislature, being an Act which deals with trade and commerce.

Counsel also contended that the powers of the several Provinces prior to Confederation had not been transferred to and vested in the separate Provinces which compose the Dominion; and that if the Local Legislature had incidental power to enforce its enactments, there could not possibly be any need of specifying the punishment, as "fine," etc.; and further, if the means for enforcement were within the discretion of the separate Provinces, they might, in cases where hard labour was not effective, direct corporal punishment.

In addition to the authorities referred to in the Court below, counsel referred to and commented on Imperial Acts 15 Geo. II., c. 24; 4 Geo. IV., c. 19, sec. 2; c. 64, sec. 10; 5 Geo. IV., c. 83, sec. 11; 6 & 7 Vict. c. 96, sec. 4; 28 & 29 Vict. c. 126, sec. 4; Con. Stat. U.C., c. 76, sec. 11, *et seq.*; Con. Stat. C., c. 73, sec. 97; c. 107; Can. Stat. 20 Vict. c. 28, secs. 1, 5, 8; Dom. Stat. 36 Vict. c. 69, sec. 2; 38 Vict. c. 46; 44 Vict. c. 32, secs. 4, 6; R. S. O. c. 218; *The Queen* v. *Burah* (1); *Regina & Lougee* (2); *Kirkpatrick* v. *Askew*, Rob. & Jos. Dig. 1992; *Adley* v. *Reeves* (3); [*Slavin* v. *Village of Orillia* (4); *Ulrich* v. *National Ins. Co.* (5); *License Commissioners of Prince Edward* v. *County of Prince Edward* (6); *Severn* v. *The Queen* (7); *Citizens Insurance Co.* v. *Parsons* (8); *Theberge* v.

(1) 3 App. Cas. 889.
(2) 10 U. C. L. J. 135; *ante*, p. 324.
(3) 2 M. & Selw. 53, 61.
(4) 36 U.C.Q.B. 159; *ante*, vol. 1, p. 688.
(5) 42 U. C. Q. B. 141, 157.
(6) 26 Grant, 452; *post*.
(7) 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.
(8) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

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Landry (1);] *McCulloch* v. *State of Maryland* (2); *Wilberforce* on Statute Law, p. 50; *Bump's* Notes of Constitutional Decisions, pp. 95 to 100, 318 to 320, 336 to 338, and cases cited; *Cooley* on Constitutional Limitations, 3rd ed., pp. 63, 64, and cases cited; *Dillon* on Corporations, sec. 270, (3rd ed., sec. 336).

SPRAGGE, C. J.:—

The conviction in this case is for the keeping by the defendant of manufactured liquors at his house in the town of Chatham, "for the purpose of bartering, selling, or trading therein, without license;" and, it appearing that the defendant had been previously convicted of the like offence, the defendant was adjudged for his second offence to be imprisoned at hard labour for three months.

The statute under which the defendant was convicted, warrants the conviction and the sentence. This is not disputed; but it is objected that it was *ultra vires* the Legislature of Ontario to pass the Act under which the defendant was convicted, it being, as is alleged, an Act which deals with trade and commerce; and further, that assuming the Act not to be objectionable on that ground, it is *ultra vires* in so far as it imposes hard labour with imprisonment, as the punishment for the offence committed.

In the Court appealed from the case was argued wholly on the point as to the power of the Legislature to impose hard labour, and on the argument on appeal the other point was so faintly touched upon by Dr. *McMichael* that I took him to be rather suggesting whether the provision, for breach of which defendant was convicted, might not be *ultra vires*, than contending that it was so. I think it quite clearly a matter *intra vires* the Provincial Legislature.

(1) 2 App. Cas. 102; *ante*, p. 1. (2) 4 Wheaton, 311, 421.

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It is, I think, clearly so as a matter of police regulation; and being so, falls within one of the enumerated classes, viz., "municipal institutions."

With regard to the point made in argument that clause 9 authorizes legislation in relation to shop, saloon, tavern, auctioneer, and other licenses, only in order to the raising of a revenue, I observe that in several of the reported cases it has been assumed that the power to legislate in regard to licenses is limited by the purpose indicated in clause 9. It does not appear to me that that was the purpose of clause 9. The power of licensing shops, saloons, taverns, and auctioneers, and granting some other licenses, existed in municipal bodies at the date of Confederation, and that power passed to the provincial Legislature under clause 8. If clause 9 is to be read as it is assumed that it should be read, it abridges the power conferred by clause 8, and would limit the power to legislate in relation to these licenses to cases in which they were necessary in order to the raising of revenue, however necessary such legislation might be, in the case of houses of public entertainment, to the prevention of intemperance and the preservation of order.

My interpretation of clause 9 is that it is cumulative to clause 8, and that it was intended to authorize Provincial legislation (or at least to settle any doubts that might exist upon the point), in relation to the licenses enumerated, for the purpose of raising revenue, as well as for the regulation of matters of police. I have hesitated in placing this construction upon clause 9, because so far as I am aware the more limited construction placed upon it in the earlier cases after Confederation has been generally accepted as the correct interpretation of the clause; but I am unable myself to concur in that construction.

The point upon the question argued in the Court below

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is put thus by the learned Chief Justice: "It seems to us that the decision in this case must turn on the simple point—does a power to punish by imprisonment carry with it the power to inflict hard labour in addition to the power to restrain personal liberty."

It may be conceded that an Act creating an offence and annexing imprisonment simply, as the penal consequence of the committing of the offence, would not warrant a sentence of imprisonment with hard labour; but the question is a very different one when we find the word in an Imperial Charter conferring a constitution. When the word is found in an Act creating an offence, the rule invoked by the learned Chief Justice no doubt applies, viz., that "words conferring authority to punish in any specified manner must be construed with reasonable strictness." And so, a judge trying a party for an offence has not authority to award a punishment beyond that which he finds in the Act, or by a plain rule of criminal law annexed to the offence. The position of a Legislature is widely different; and the language of Vattel, which I have quoted in the case against *Hodge* (1) is apposite: "while we may well resort to the meaning of single words to assist our enquiries, we should never forget that it is an instrument of Government we are to construe, and . . that must be the truest exposition which best harmonizes with its design, its objects, and its general structure."

The Confederation Act gives power to Provincial Legislatures to make laws in relation to a number of classes of subjects. The necessity of conferring power to enforce these laws was foreseen. The Act does not say that persons convicted of offences against these laws may be punished by fine, penalty, or imprisonment; but it con-

(1) [7 App. Rep. 246; not reported in this volume, as the case has been appealed to the Privy Council.]

fers powers to make laws in relation to punishment in the same terms as are used in relation to other legislative power conferred, or, in the words of the Act, the power of imposition of punishment by fine, penalty, or imprisonment, is one of the "classes of subjects" in relation to which exclusive power of legislation is conferred; and it is conferred in order to the enforcing any law of the Province in relation to the enumerated classes of subjects It must be conceded that the power thus expressly conferred is to be limited to punishment by fine, penalty, or imprisonment; still, in interpreting the words used, the rule as to construing the Act with strictness, or even with reasonable strictness, does not apply; it does not, in my judgment, apply, because it is used in conferring power upon a Legislature, not in simply annexing to a crime its penal consequences; in which latter case the rule of strictness has always been the rule of construction; while in the case of what Vattel calls an Instrument of Government, which the Confederation Act certainly is, no such rule prevails.

The word imprisonment does not *ex vi termini* exclude the imposition of hard labour, for we find in the Municipal Act in force at the date of Confederation the term imprisonment with or without hard labour; and in Acts in force at the same date we find it declared that a sentence of imprisonment in the Penitentiary shall include hard labour whether expressed or not; and what is nearer to the case before us, by sect. 110 of c. 99 of the Consolidated Statutes of Canada, we find it enacted that "when a person has been convicted of an offence in which imprisonment other than in the Penitentiary may be awarded, the Court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common Gaol or House of Correction;" and it enables the Court to sentence him also to solitary confinement. The pro-

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vision in the Municipal Institutions' Act of 1866, respecting work-houses and houses of correction (section 417), authorizing commitments with or without hard labour; and the Co-operative Associations' Act of the previous year authorizing the same punishment, may also be referred to.

The Imperial Parliament in framing the Confederation Act must be taken to have known what was the law in the Provinces in relation to the classes of subjects enumerated in sections 91 and 92 ; to have known, therefore, *inter alia*, the provisions of the Municipal Institutions' Act of 1866. Parliament therefore knew that in order to the enforcing of by-laws of municipal corporations imprisonment with hard labour was one of the means authorized by the law of Upper Canada.

But, it is said that imprisonment, with hard labour as a direct punishment, could not be awarded for selling liquor without license; that is so, but imprisonment with hard labour could be awarded in the event of non-payment of fines, and in the absence of distress. It was then awarded in order to the enforcing of the law the very purpose for which imprisonment is authorized by section 92, "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law," etc. It would be abridging the power already possessed by the Provincial Legislatures to deny to them the power exercised in this case; for imprisonment, whether it be adjudged directly for breach of the law or because the culprit has not paid the fine inflicted, and there being no means of levying it, is, as put in section 92, a punishment in order to the enforcing of the law. Parliament found Provincial Legislatures possessed of the power of enforcing the laws of their Provinces in regard to matters of police regulation (as well as in regard to the criminal law outside of matters of police) by imprisonment, with or without hard labour.

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The Provinces surrendered *inter alia* their power of legislation in relation to "The Criminal Law." They received *inter alia* express power to enforce the laws of the Provinces by fine, penalty, or imprisonment; to make laws in relation to so enforcing them.

The Act, as has been often said, was the fruit of a compact. Is it reasonable to read the Act as if intended to fetter the Provincial Legislatures in their discretion as to the kind of imprisonment which they should judge to be reasonable and proper for an infraction of their laws, even to abridge the power in matters of police regulation—matters peculiarly within their province—which they already possessed?

The amount of fines, the kind of penalty, the duration and place of imprisonment, are all left wholly to the Provincial Legislatures; but if this clause of the Act has been correctly interpreted, the Legislatures were powerless to say how those sentenced to imprisonment should be employed: the effect would be, that they were to be within the walls or yards of a prison, but unemployed—idle.

It is safe to say that the word "imprisonment" could not have been received in that sense by the parties chiefly interested in the compact—the Provinces; and we are assisted in the meaning which the Imperial Parliament would attach to the word by the course of Imperial legislation for many years back. Mr. *Hodgins*, in a paper put in with the appeal books, has furnished us with numerous instances of punishment by imprisonment with hard labour under English law (1). As long ago as the time

(1) Memorandum on the Imperial Statutes, under which imprisonment with hard labour, or other punishment, or imprisonment in Houses of Correction, was imposed for minor offences against statutes in force in England prior to the Upper Canada Act, 32 Geo. III. c. 1 (1792).

1.—HOUSES OF CORRECTION.

7 James I., c. 4: There shall be erected, built, or otherwise provided, within every county wherein there is not one house of correction already, one or more fit and convenient house or houses of correction, with convenient backside thereunto

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of James I, Houses of Correction were established, and those imprisoned in them had to support themselves by

adjoining, together with mills, turns, cards, and other like necessary implements, to set the said rogues and other idle persons on work; the said houses to be built, erected or provided in some convenient place or town in every county, etc., to the intent the same shall be used and employed for the keeping, correcting and setting to work of the said rogues, vagabonds, sturdy beggars, and other idle and disorderly persons (s. 2). The governor of such house of correction to have power to set such rogues, etc., as shall be brought or sent into said house to work and labour (being able) from time to time, for such time as they shall continue and be remaining in the said house of correction, and to punish the said rogues, etc., by putting fetters or gyves on them, and by moderate whipping of them; and that the said rogues, etc., during the time they shall continue and remain in the said house, shall in no sort be chargeable to the country for any allowance, either at their bringing in or going forth, or during the time of their abode there, but shall have such and so much allowance as they shall deserve by their own labour and work (s. 4). Wandering and idle persons to be sent to the house of correction, and to be set to labour and work (s. 5). Lewd women, who have bastards, to be sent to the house of correction, to be punished, and set on work (s. 7). Man or woman, able to work, who threaten to leave his or her family upon the parish, to be sent to the house of correction (s. 8).

6 George I. c. 19: Justices of the Peace may commit vagrants, and other criminal offenders, and persons charged with small offences, who are, for such offences, or for want of sureties, to be committed to the county gaol, either to the common gaol or house of correction, as they in their judgment may think proper (s. 2).

15 George II. c. 24: Justices of the Peace may commit any person liable by law to be committed to the house of correction in certain places, to the house of correction of the county in which such place is situate, which person so committed shall be received, etc., and be set and kept to hard labour.

24 George III. Sess. 2, c. 56: Justices of Assize, or two or more Justices of the Peace, may remove any person confined in county or city gaol under sentences and orders made by one or more Justices of the Peace at their Sessions, or otherwise, upon convictions in a summary way, without the intervention of a jury, to any house of correction, there to be confined, and to remain in execution of such sentence or order.

27 George III. c. 11: Justices of the Peace may commit, either to the common gaol or to any house of correction, such vagrants and other criminals, offenders, and persons charged with, or convicted of, small offences, as by any law now in force, or hereafter to be made, they are, or shall be authorized to commit to the common gaol.

2.—SELLING LIQUOR WITHOUT LICENSE.

3 Charles I. c. 3: Persons keeping alehouses without licenses, to pay a fine of 20s., and in default of payment or sufficient distress, to be committed to the custody of a constable, "to be openly whipped for the said offence, as the said Justice or Justices shall limit or appoint" (s. 2). For a second offence, to be committed to the house of correction, and "be dealt withal as idle, lewd,

their own work. By an Act of George II. persons committed by justices to houses of correction were to be set

and disorderly persons;" and for a third offence, to be committed to the house of correction until delivered by Justices in General Sessions (s. 4).

9 George II. c. 23: Persons hawking or selling spirituous liquors on the streets, highways or fields, or upon the water, in any ship, boat, or vessel, or in any stalls or sheds, to pay a fine of £10, and in default of payment, to be committed to the house of correction, and kept at hard labour for two months (s. 13.)

10 George II. c. 17: Offenders convicted under the above Act (9 Geo. II. c. 23), neglecting to pay penalty and committed to the house of correction, "shall, before his or her discharge therefrom, be stripped naked from the middle upwards, and whipped until his or her body be bloody" (s. 9).

16 George II. c. 8: Persons selling liquor without renewing yearly license to sell liquors, to pay a fine of £10, and, in default of payment, to be committed to the house of correction, and kept at hard labour for two months (s. 9).

20 George II. c. 39: Persons found tippling in distilleries to be fined, and, in default of payment or sufficient distress, to be committed to the house of correction, and kept at hard labour for a limited time (s. 5).

24 George II. c. 40: None to be licensed to retail liquors but such as occupy a tenement of £10 yearly value, and pay parish rates, or church and poor rates (s. 8). Unlicensed retailers of liquor, in addition to previous penalties, to forfeit liquors in his possession for first offence; and for second offence, in addition to the former penalties, to be committed to the house of correction, and kept at hard labour for a limited time; for third offence to be transported (s. 9).

26 George II., c. 31: Persons convicted of selling ale, beer, or other liquors, without license, to pay a fine of 40s. for first offence, £4 for second offence, and £6 for third offence, and in default of payment or sufficient distress, offenders to be committed to common gaol, or other prison, or house of correction (s. 12). See also 28 George II. c. 19, s. 2.

30 George II. c. 24: Publicans permitting journeymen, labourers, servants, and apprentices to game with dice, etc., in their houses, to be fined for first and subsequent offences (s. 14). Journeymen, etc., gaming in any house where liquors are sold, to be fined, and if fine not paid down forthwith, the offender may be committed to the house of correction, or some other prison, and kept at hard labour (s. 15).

13 George III. c. 78: Alehouses not to be kept on bridges where tolls are taken. Penalty: fine, or gaol, or house of correction (ss. 62, 72).

14 George III. c. 90: Keepers of public houses harbouring watchmen during the hours of watching, to be fined for cumulative offences, and in default of payment or sufficient distress, offenders to be committed to the common gaol or house of correction (s. 19).

35 George III. c. 113: Persons selling liquor without license to be fined for first offence, and in default of payment or sufficient distress, to be imprisoned; and for second offence to be thereafter disabled from being licensed to keep alehouses, etc. (ss. 1, 2, 5).

4 James I. c. 5: Drunkards to pay a fine, or be committed to the stocks for certain hours (ss. 2, 4).

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to hard labour. Under a very old Act, 3 Car. 1, c. 3, persons keeping ale-houses without license were made liable

3.—HACKNEY COACHES.

9 Anne c. 23: Persons driving licensed hackney coaches, if guilty of misbehaviour, to be fined, or in default of payment, to be committed to house of correction and kept at hard labour (s. 49).

10 Anne c. 19: Hackney coachmen, who carry persons for hire without license, to be subject to penalties (s. 159).

1 George I. Sess. 1, c. 57: Person driving mourning coach without a number to be fined or sent to the house of correction (ss. 4-8).

30 George II. c. 22: Persons obstructing streets with empty casks, etc.; plying coaches for hire in certain streets; driver of carriage obstructing passage; persons obstructing passage with empty waggons; drivers riding on their waggons, to be fined or committed to house of correction and kept at hard labour (ss. 5-9).

7 George III. c. 44; 10 George III. c. 44: Persons liable to be committed to prison for offences against Hackney Coaches Acts, may be committed to bridewell or other house of correction, there to be kept at hard labour. See also Highway Act, 13 George III. c. 78, ss. 40, 52, 61.

4.—HAWKERS AND PEDLERS.

9 & 10 William III. c. 27: Hawkers and pedlers to be licensed. Penalty for trading without a license, £12; and for refusing to produce license to a Justice of the Peace, £5; offender not paying fine to suffer as a common vagrant, and to be committed to the house of correction (s. 3). See also 29 George III. c. 26.

5.—GAME LICENSES.

13 Charles II. c. 10: Persons unlawfully hunting deer to be fined £20, or sent to house of correction and kept at hard labour.

4 Will. & Mar. c. 23: Unqualified persons keeping dogs, ferrets, etc., to be fined, or sent to the house of correction, and kept at hard labour, and whipped. Persons unlawfully having hares, partridges, pheasants, etc., in their possession to be fined or sent to the house of correction, and whipped, and kept at hard labour (ss. 3, 11).

2 George III. c. 29: Persons shooting house-doves or pigeons to be fined, or sent to gaol or house of correction and kept at hard labour.

13 George III. c. 55: and c. 80: Persons killing black game or red game, between, etc., to be fined, or committed to house of correction, and kept at hard labour.

6.—SERVANTS, WORKMEN AND APPRENTICES.

5 Elizabeth, c. 4: Servants not procuring testimonials from last place before entering a new service, to be imprisoned for 21 days; and if testimonials not then procured, to be whipped and used as vagabonds (s. 11).

9 George I. c. 27; 12 George I. c. 34; 17 George II. c. 13; 6 George III. c. 25: Workmen going to other employers before completing their contracts of service, to be committed to the house of correction, and kept at hard labour.

20 George II. c. 19; Masters' complaint against a servant or apprentice of ill behaviour, etc., to be heard before a Justice of the Peace, and offender to be punished by commitment to the house of correction, there to remain and be corrected, and held to hard labour (ss. 2, 4).

8 George III. c. 17: Hours and prices of labour fixed by Act. Per-

to be committed for a second offence to the House of Correction, and consequently to be put to hard labour. By

sons offending against the Act to be committed to the house of correction and kept at hard labour (ss. 1, 2). *Shea* v. *Choat*, 2 U. C. Q. B., 211.

14 George III. c. 78: Servants, through negligence or carelessness, setting fire to house, to be fined, or, in default of payment, to be committed to gaol or house of correction, and kept at hard labour.

7.—PROFANE SWEARING

21 James I. c. 20: Persons guilty of profane swearing to be fined, and if fine not paid, or not sufficient distress, offenders to be set in the stocks, or if offenders under 12 years of age, to be whipped by constable or parent. (See also 6 and 7 William III. c. 11).

19 George II. c. 21: Persons guilty of profane swearing to pay a fine, or, in default, to be committed to the house of correction and kept at hard labour (s. 4). Constables not doing their duty under the Act to be fined, and, in default of payment, to be committed to the house of correction and kept at hard labour (s. 7). Offenders to pay all charges of information and conviction, or, in default, to be committed to the house of correction, and kept at hard labour for six days over and above the limit of time previously specified (s. 10).

8.—ASSIZE OF BREAD.

8 Anne c. 18: Assize or weight of bread to be regulated by the Lord Mayor, or Mayor, or Justices of the Peace where no Mayor.

31 George II. c. 29: Regulating the due making, price, and assize of bread. Journeymen or servant of baker offending, to be fined, and, in default of payment, to be committed to gaol or house of correction, and kept at hard labour (s. 33).

3 George III. c. 6, and c. 11: Offence by servant, etc., to be punished by fine, and in default of payment, offender to be committed to the house of correction or some other prison, and kept at hard labour. Other offenders to be fined, or, in default of payment, to be committed to gaol or house of correction.

9.—MISCELLANEOUS.

43 Elizabeth, c. 2: Poor rates to be levied by distress, and sale of goods, etc.; and, in default of distress, the person liable therefor is to be committed to gaol until paid; and the Justices of the Peace are to send to the house of correction or gaol such as shall not employ themselves to work being appointed thereunto (s. 4).

13 & 14 Charles II. c. 1: Quakers and Separatists refusing to take lawful oaths, for first offence, fine of £5 or gaol or house of correction; for second offence, fine of £10, or gaol or house of correction at hard labour (s. 2).

1 William and Mary, stat. 1 c. 8: Persons refusing to take the oaths of supremacy and allegiance, for first and second offences to be committed to gaol or house of correction, or fined; for third offence, to be disqualified from holding any office (s. 9).

8 and 9 William III. c. 30: Persons receiving alms to wear a badge "P" on right sleeve. Penalty: to be refused allowance as poor persons, or to be committed to the house of correction, there to be whipped and kept at hard labour (s. 73).

10 George II. c. 22, s. 12, and c. 31, s. 15; 14 George III. c. 90, ss. 17, 19: Constables, watchmen, etc., neglecting their duty, to be fined or com-

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9 George II. persons selling spirituous liquors under certain circumstances were made liable to commitment to the House of Correction with hard labour; and several other instances are given of the like punishment for the like offences.

A good deal that was said in the case of *McCulloch* v. *The State of Maryland* (1), by that very learned and able jurist, Chief Justice Marshall, is apposite to the case before us. There were two leading questions in the case. The first, and the one material as bearing upon this case, was, whether it was in the power of Congress to establish a national bank, the Constitution, in the powers enumerated, not giving authority to do so. The learned Chief Justice, almost in the words of Vattel, says, "In considering this question, then, we must never forget that it is a Constitution we are expounding."

There is much more in the judgment of the learned Chief Justice that is apposite to the question of the interpretation of the words used in clause 15 of section 92, but as it is apposite not only to that question, but to another point made by the learned Attorney-General, I will reserve the citation of them to the discussion of that point. The point shortly, is, that the Provincial Legislatures had, as incident to their constitution, the power of

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mitted to the house of correction and kept at hard labour. Pecuniary forfeitures and penalties, under the Watchman's Act, to be enforced by distress, or in default, the person liable therefor is to be committed to gaol or house of correction and kept at hard labour.

10 George II. c. 28: Persons acting plays in places where they have not a settlement, or without Lord Chamberlain's authority, to be deemed vagabonds and fined £50, and in default of distress to be committed to gaol or house of correction, and kept at hard labour (ss. 1-6). See also 10 George II. c. 19.

22 George III. c. 83: Churchwardens neglecting to notify the guardians respecting the poor in their parish (ss. 7, 45), and guardians enticing or removing pregnant women from one parish to another (ss. 41, 45), and visitors, guardians or governors furnishing materials of their trade to the poor house, to be fined or sent to the house of correction.

(1) 4 Wheaton, 316.

enforcing the laws made by them in relation to any matter coming within any of the classes of subjects assigned to their jurisdiction, and to make laws for that purpose, and did not need the express power given by clause 15. There is much force in this. I think it is sound in principle, and that the office of clause 15 is to give express sanction to it; and at the same time to prescribe, but to prescribe in general and comprehensive terms, the nature of the punishment by which those laws might be enforced.

The learned Chief Justice Marshall puts thus pithily the powers of sovereignity as divided between the Government of the Union and the Governments of the States: "They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." After enumerating some of the great powers committed to the Government of the Union (among which, however, as he says, we do not find the word "bank" or "incorporation"), he proceeds: "It may, with great reason, be contended that a Government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog, and embarrass its execution by withholding the most appropriate means."

The powers assigned by the Confederation Act to the Provincial Legislature are large and various; and it is not too much to say that it is a reasonable contention that Legislatures entrusted with such powers, on the due execution of which the happiness and prosperity of the Provinces so largely depend, must also be entrusted with

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ample means for their execution. The learned Chief Justice had to meet this difficulty, that the Constitution of the United States does not confer upon Congress power, as the Confederation Act confers upon the Provinces power, to make laws "in relation to" the enumerated classes of subjects; but only such powers as may be "necessary and proper" for carrying them into execution. After commenting upon and interpreting the language used, the Chief Justice proceeds: "So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the Government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of Congress. . . . .

"The good sense of the public has pronounced without hesitation that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise." I will conclude my citations from the judgment of the learned Chief Justice with this apposite quotation: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but con-

sistent with the letter and spirit of the Constitution, are constitutional."

I make no apology for quoting so largely from the judgment of Chief Justice Marshall. It enunciates clearly and forcibly, constitutional doctrines which, from the nature of the Constitution of the United States, have been necessarily presented to the consideration of the judges of that country more than has been the case in England, and which, since Confederation, have an important bearing upon the powers of the Dominion and Provincial Legislatures.

I may be allowed to add that it appears to me that these implied powers, or powers incident to the principal power conferred, have their root in the rule often enunciated, that where power is conferred to do an act or several acts, the power conferred in terms carries with it by implication all the powers that are necessary to the due and effectual execution of the principal power conferred.

In my judgment, however, it is not necessary to resort to the doctrine of implied power, for I think that the language of clause 15, giving power to make laws for enforcing Provincial law by, *inter alia*, "imprisonment," found where it is in a charter of Government, and looking at the law as it then stood, and to the statutes and the circumstances to which I have adverted, must be interpreted as conferring power to enforce Provincial laws by imprisonment with hard labour. Without adopting as my own all the language of Mr. Pomeroy in his book on Constitutional Law, p. 16, I think with him that an instrument conferring a Constitution should not by interpretation lose its character as the fundamental organic law of a Government, and be brought to the level of an ordinary private statute, to be expounded with the technical and literal precision which would be appropriate to a penal code.

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I feel that I have not by any means exhausted the subject. I have left some points untouched, but the considerations to which I have directed my attention, and which I have endeavoured to explain, lead me to the conclusion that the Legislature of Ontario had the power which it exercised, and which has been adjudged in the Court appealed from to be *ultra vires*.

BURTON, J. A.:—

I have entered very fully into the question discussed, in *The Queen* v. *Hodge* (1), and think it unnecessary to add more than a few words in this case to the judgment of the learned Chief Justice, in which I fully agree.

We find in the B. N. A. Act the very fullest powers of self-government granted to the Provinces—the most ample authority to make laws in reference to the public lands, the establishment of prisons, municipal institutions, the solemnization of marriage, property and civil rights, and the administration of justice; in relation to all matters, in fact, except those which may affect the whole Dominion; and in the last of these enumerated powers, that which grants expressly the means of enforcing these laws, the Province is authorized to legislate in relation to the imposition of punishment by fine, penalty, or imprisonment, as it is said, for enforcing the enactments which they are so empowered to pass.

It would be a result somewhat surprising and hardly in consonance with the scheme of Confederation if it were to be found that the Legislature, after passing these laws, was powerless to enforce them without the aid of the Dominion Parliament, in the enactment of a law awarding a punishment for their violation; making the Local Legislatures, in fact, dependent upon that of the Dominion; and it would be equally opposed to sound prin-

(1) [7 App. Rep. 246; not reported in this volume, as the case has been appealed to the Privy Council.]

ciples of construction in dealing with the words of a Constitution, to place upon the language of the section in question the meaning contended for at the Bar—a construction which would cripple the Provincial Governments and render them and the Legislatures unequal to the objects for which they are declared to be instituted. Is there any reason to suppose that the Parliament which entrusted to the Legislatures of the Provinces the power to deal with the property of individuals and the civil rights of communities, without restriction of any kind, intended in any way to restrict the power of imprisonment when necessary for the enforcement of those laws any more than it has done with reference to the fines and penalties ?

Where the power is granted in general terms, it is to be construed as co-extensive with the terms, unless some clear restriction is deducible from the context.

I accede to the argument that when a Legislature declares that an infraction of its laws shall be punished by imprisonment, that offence constitutes a crime, but I think also that it is a crime with which the Province, and the Province alone, has power to deal.

I was somewhat surprised that we were again pressed with the argument that the Liquor License Act was *ultra vires* as dealing with trade and commerce, an argument which, if pressed to its logical conclusion, would effectually preclude the Local Legislatures from dealing with any particular trade or business within the Province ; and the Privy Council have decided that the words are not to be regarded in any such contracted sense, but to refer to political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and possibly general regulations of trade affecting the whole Dominion. (1)

(1) [See Citizens Ins. Co. v. Parsons, 7 App. Cas. 96 ; *ante*, vol. 1, p. 265.]

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I am of the opinion that in this case also the judgment of the Court below was erroneous, and that this appeal should be allowed.

PATTERSON and MORRISON, JJ.A., concurred.

JUDGMENT IN QUEEN'S BENCH.

[*Reported 46 U. C. Q. B. 153.*]

HAGARTY, C. J. :—

The case was argued before us wholly on the point as to the power of the Legislature to impose hard labour.

Defendant's counsel insisted that a power to imprison did not authorize the further sentence of "hard labour," which is a substantive punishment.

For the Crown it was urged that a Legislature, having the admitted right to imprison, must also have the power to add hard labour as a consequence, or as a matter of prison discipline.

We have had occasion, in another case argued this term, to again consider the extent of the powers conferred by the B. N. A. Act on the Local Legislature (1).

It seems to us that the decision in this case must turn on the single point, does a power to punish by imprisonment carry with it the power to inflict hard labour in addition to the power to restrain personal liberty?

There is no *express* decision on this point in our Courts.

In *Regina* v. *Boardman* (2), it is not stated, in the report, that the imprisonment awarded was accompanied by "hard labour."

Mr. *Harrison*, Q.C., for the *prisoner*, objected that 32 Vict. c. 32, s. 32, O., being to create an offence punishable by hard labour, in other words, *a crime*, was an enactment relating to the criminal law and *ultra vires*.

The judgment of Richards, C. J., upheld the power of the Legislature to pass the Act, and that they had the power to impose punishment by fine or imprisonment for enforcing any law passed by them in matters within their jurisdiction.

1) Regina v. Hodge, 46 U. C. Q. B. 141; Reversed 7 App. R., Ont., 246.
(2) 30 U. C. Q. B. 553; *ante*, vol. 1, p. 676.

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It was a conviction for compromising an offence under the liquor law. The chief discussion was, whether the charge involved the commission of "a crime."

The learned Chief Justice says: "By the 32nd section they provide for the imprisonment at hard labour in the common gaol of any person who had violated the statute, who should compound or settle the offence. . . .

"This all seems to us to be within the reasonable scope of the powers conferred on the Local Legislature."

The attention of the Court seems never to have been directed to the "hard labour" question, and on sending for the papers we find that the conviction was *not* for imprisonment with hard labour.

The learned counsel, when afterwards Chief Justice of the same Court, says, in *Regina* v. *Black* (1), at p. 192: "The question whether the Imperial Legislature . . . . meant, under the words 'the imposition of punishment by fine, penalty or *imprisonment* for enforcing any law of the Province,' etc., as used in sect. 92, sub-sec. 14 (of the B. N. A. Act), to confer on the Provincial Legislature power to imprison *at hard labour*, is one upon which we have considerable doubt, but are not called upon at present to decide the point.

"It may be when the point arises that the decision of this Court in *Regina* v. *Boardman* (2), decided shortly after the Confederation Act, which apparently affirms the power of Provincial Legislatures to authorize imprisonment at hard labour, will demand reconsideration in the light of more recent decisions."

He refers to *Regina* v. *Roddy* (3), where there is a learned discussion as to what is a crime or criminal matter, citing, *inter alia*, *Easton's case* (4).

In *Regina* v. *Lawrence* (5), before Mr. Justice Gwynne, in single Court, and confirmed on appeal in full Court, the conviction was under sect. 57 of c. 181, R. S. O., for inducing witnesses for a prosecution to absent themselves, imposing a fine and imprisonment, in default of distress, for thirty days at hard labour.

The Ontario Act, authorizing the conviction, did not empower "hard labour" to be imposed, and the points discussed do not touch this question.

(1) 43 U. C. Q. B. 180.
(2) 30 U. C. Q. B. 553; *ante*, vol. 1, p. 676.
(3) 41 U. C. Q. B. 291; *ante*, vol. 1, p. 709.
(4) 12 A. & E. 645.
(5) 43 U. C. Q. B. 164; *ante*, vol. 1, p. 742

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"Imprisonment" has been defined to be "nothing else but a restraint of liberty": 2 Hawk. P. C. 8th ed., 184.

The word "penalty," when used as here, "fine, penalty, or imprisonment," must, we think, mean merely what is sometimes defined to be "a pecuniary fine or mulct." There are money penalties, and corporal or personal penalties. See Wharton's Law Dict., Tomlin's Law Dict., Abbott's Law Dict., and an American authority there cited: *Kenney* v. *Hosea* (1).

We are satisfied that if the law merely direct imprisonment as the punishment of an offence, no Court of Justice can, in the absence of any general discretionary power to that effect, award hard labour in addition. We are of opinion that it is an additional substantive punishment, varying only in degree from the infliction of whipping or the treadmill, solitary confinement, etc.

All the text books separate the punishment—imprisonment, or imprisonment with hard labour, etc. Hard labour is in fact a statutable addition to imprisonment, generally found to be enacted in the Act creating the offence, sometimes in statutes giving it as a discretionary power to a Court in awarding imprisonment.

As in the Imperial Malicious Injuries Act, 24 & 25 Vict. c. 97, s. 74, "whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the Court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour," etc. Also in the Larcenies Act, same year, c. 96, s. 118, to same effect, always separating the two punishments. See Cox & Saunders' Criminal Acts, pp. 97, 136, 230.

Collyer on Criminal Statutes, 524, calls 3 Geo. IV. c. 114, the Hard Labour Act. This Act recites 53 Geo. III. c. 162, which repeals and extends the provisions of 52 Geo. III. c. 44, all of which, with increasing application, allow hard labour to be added to imprisonment.

Our Upper Canada Act, 1833, 3 Wm. IV. c. 4, s. 25, speaks of the Court adjudging a prisoner "to be imprisoned only, or imprisoned and kept to hard labour."

Con. Stat. C., c. 99, s. 102, the Criminal Procedure Act, declares that a sentence of imprisonment in the penitentiary shall include hard labour, whether expressed or not. By sect. 110, on conviction of any offence for which imprisonment other than in the penitentiary may be awarded, the Court may sentence to imprisonment.

(1) 3 Harr. (Del.) 77.

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or to be imprisoned and kept to hard labour in the common gaol, etc., and may also direct solitary confinement.

The Procedure Act of 1869, 32 & 33 Vict. c. 29, s. 94, directs that on a conviction for an offence for which imprisonment other than in the penitentiary may be awarded, the Court may sentence the prisoner to be imprisoned, or, if hard labour be part of the punishment, then to be imprisoned and kept to hard labour, or if solitary confinement be part of the punishment, then it may be so directed etc. Section 97 repeats the former clause as to penitentiary imprisonments.

The Summary Conviction Act of the same session, c. 31, s. 56, allows costs to be levied by distress, and in default imposes imprisonment with or without hard labour, not exceeding a month. By sect. 59, when a distress would be ruinous to a defendant, the Justice may commit him to imprisonment with hard labour, as if no distress could be levied. By sect. 62, where no distress can be levied, etc., a warrant may be issued to imprison defendant, or to imprison him and keep him to hard labour in the manner and for the time directed by the Act or law on which the conviction was had, etc., etc.

By the last Municipal Act passed before Confederation (29 & 30 Vict. c. 51. s. 246). municipal councils could pass by-laws for inflicting fines up to $50 for breach of the by-laws of corporations, and imprisonment with or without hard labour in gaol in default of payment, or levy by distress.

It is urged forcibly by Mr. *Hodgins* that, with the general legislation as to imprisonment at the time of Confederation, with power held by the municipalities to award imprisonment with hard labour in default of payment of the penalty for violation of their by-laws, we must consider that the Local Legislature, under the general authority to punish by imprisonment in cognate matters, must be held to be able to award hard labour.

The words of the B. N. A. Act are that they may exclusively make laws in relation to "The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

Could it have been intended that the legislative body which had plenary authority to alter, modify, or abolish municipal institutions, could not legislate on purely municipal matters, such as tavern licenses, with at least as large power of enforcing their decrees as

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the municipal bodies enjoyed to enforce their by-laws on similar subjects?

On the other hand, we are pressed by the consideration that words conferring authority to punish in any specified manner must be construed with reasonable strictness, and that great caution is required in extending the meaning of such words beyond their ordinary legal significance.

It is to be carefully considered what the punishment for selling liquor without license was at the time the Imperial Parliament gave the foregoing powers to the legislative body they were creating.

The Act of 1866 seems to have been the then existing law, 29 & 30 Vict. c. 51.

After giving the general power to municipalities to inflict fines for infraction of their by-laws, it legislates expressly on tavern licenses, providing for the passing of by-laws regulating the mode of granting, the number, security, etc., and the amount to be paid, etc.

Sect. 254 begins by requiring every tavern-keeper to exhibit his sign, etc., under a penalty of $1, etc., and proceeds, "But no person shall sell or barter intoxicating liquor of any kind without the license therefor by law required, under a penalty of not less than $30 and costs, and not over $50 and costs." This is the only penalty we find in the Act for selling without license.

Sect. 256 enacts that all prosecutions for penalties for selling without license shall be recoverable, etc.

Then follow heavy penalties of fine or imprisonment with hard labour, for selling between Saturday night and Monday morning.

Sect. 260 declares that all penalties shall be paid in certain proportions, be levied by distress, and in default thereof imprisonment (merely), not exceeding thirty days.

So that under this Act there was no award of imprisonment *with hard labour* in default of payment of the money penalty for selling without license, nor any power to impose imprisonment directly for selling without license.

Under the general power to the municipalities in the same effect it does not appear that there was any authority to impose imprisonment directly for breach of a by-law; the imprisonment was only "in case of non-payment of the fine inflicted for any such breach, and there being no distress found," except in certain cases in cities, and in the suppression of houses of ill-fame: 29 & 30 Vict. c. 51, s. 246, sub-s. 8.

It appears then that at Confederation imprisonment as a *direct* punishment could not be awarded for selling liquor without license.

The Local Legislature has the right to say that selling without license can be directly punished by imprisonment, and to provide for second or repeated violations of their rules. But as it is thus the exercise of a new power, must we not hold that nothing beyond the legal meaning of "imprisonment" can be intended?

If at Confederation we found the municipalities had the power to award imprisonment with hard labour as a direct punishment for infractions of by-laws, I would strongly incline to the opinion that by reasonable intendment and implication of law the Legislature, who had complete control over their existence, and who could hand over to them the disposition of such police or municipal matters as the licensing and regulation of saloons, must have at least as large a power of dealing with the punishment of "imprisonment."

We must remember that this is a matter either criminal or in the nature of a criminal charge, involving a restraint of personal liberty and corporal punishment; that our Local Legislature has no general or plenary power of legislating on Criminal Law or *quasi* criminal matters involving corporal punishment, but only the restricted and limited jurisdiction allowed by the Confederation Act; and in such a case it seems to us that such a power so given must be exercised *with reasonable exactness.*

Speaking for myself, I very much regret being obliged to come to this conclusion, as in the present state of the law on this subject it seems to me somewhat unfortunate that the Legislature of Ontario should not have such a power for the punishment of offences so difficult to deal with as breaches of the license laws.

ARMOUR AND CAMERON, JJ., concurred.

ONTARIO COURT OF QUEEN'S BENCH.

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March 3.

REGINA *v.* BRADSHAW.

[*Reported 38 U. C. Q. B. 564.*]

Criminal law and procedure—Constitution of Court—B. N. A. Act, s. 91, sub-s. 27—32-33 Vict. c. 31, s. 66, D.

An Act of the Parliament of Canada provided, in regard to appeals from summary convictions made by Justices of the Peace, that the parties might dispense with a jury if they thought fit, and submit themselves to the judgment of the Court appealed to without a jury:

***Held*, that this enactment was not an interference with the "constitution" of the Court (in relation to which the Provincial Legislatures have exclusive jurisdiction), but that it related to criminal law and procedure in criminal matters, and therefore was within the jurisdiction of the Dominion Parliament.**

Mr. *Hodgins*, Q.C., having had removed by a *certiorari*, the proceedings in Quarter Sessions hereinafter referred to, applied upon the part of one Nicoll, the prosecutor of the complaint before the Justice, under the Malicious Injuries to Property Act, 32-33 Vict. c. 22, for a rule *nisi* calling upon the chairman of the General Sessions of the Peace for the County of Elgin, and Henry Bradshaw, appellant in the case of *Nicoll* v. *Bradshaw*, to shew cause why the order made by the said Court of General Sessions of the Peace, on the fifteenth day of January, 1876, in the said appeal of Bradshaw, appellant, against Nicoll, respondent, should not be quashed, and why the said cause should not be remitted back to the said Court of General Sessions for trial, and why a writ of *mandamus* should not issue, directed to the said chairman, commanding him to hear the said appeal before a jury,

on the ground, amongst others, that the said Court had no power to try the said appeal without a jury.

On the eighth of November, 1875, Richard B. Nicoll laid an information and complaint under 32-33 Vict. c. 22, s. 29, D., before the Police Magistrate of St. Thomas, against Henry Bradshaw for having unlawfully and maliciously broken and injured a fence round the land of the said Nicoll. On the ninth of November the case was heard before the Police Magistrate, and the fact of the defendant Bradshaw having pulled down the fence, and thereby having done the injury complained of was established. The defence set up was that the fence encroached upon the land of the defendant Bradshaw, but there was evidence, which if believed, went to shew that the defendant did not commit the injury under a *bona fide* exercise or belief of a right; and the magistrate convicted and fined him.

The defendant appealed, and the appeal came on to be heard at the Court of General Sessions of the Peace for the County of Elgin held on the fourteenth of December, 1875, David John Hughes, Judge of the County Court, and Chairman of the Court, presiding.

Neither appellant nor respondent asked that a jury should be empanelled to try the case; on the contrary when the case was called on, the Court, through their chairman, urged the parties to have a jury empanelled to try it on its merits, but counsel for the respondent, the now applicant for the rule asked for, refused to have a jury, insisting that it was a case more properly to be tried by the Court, and the Court accordingly reluctantly proceeded to try the case without a jury under the provisions of 32-33 Vict. c. 31, s. 66 (1).

(1) 32-33 Vict. c. 31, s. 66: "When an appeal has been lodged in due form, and in compliance with the requirements of this Act, against any summary conviction or decision, the Court of General or Quarter Sessions of the Peace or Court appealed to, may at the request of either ap-

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STATEMENT.

The Court upon hearing and considering the evidence, having arrived at the conclusion that the appellant Bradshaw acted, although mistakenly yet in a *bona fide* belief that he had a right to remove the fence and without malice, at an adjourned Court of General Sessions of the Peace, held on the fifteenth of January, 1876, the conviction was quashed and the respondent was ordered to pay the costs of the appeal, and the sum deposited by the appellant, instead of a recognizance, was ordered to be returned to him by the Police Magistrate.

This was the order which the complainant before the Police Magistrate, the respondent in the said appeal, now desired to have quashed, and for that purpose made this motion.

GWYNNE, J.:—

[After disposing of certain objections not affecting the constitutional question, proceeded as follows, p. 568:] It was suggested that the 66th sect. of 32-33 Vict. c. 31, which authorizes the Court to proceed without a jury when neither party demands one, is *ultra vires* of the Dominion Parliament, and comes within the clause of the B. N. A. Act, which places under the jurisdiction of the Local Legislature "the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction."

But the 66th sect. of 32-33 Vict. c. 31, comes, in my

pellant or respondent, empanel a jury to try the facts of the case, and shall administer to such jury the following oath:—

"'You shall well and truly try the facts in dispute in the matter of A. B. (*the informant*) against C. D. (*the defendant*), and a true verdict give according to the evidence; so help you God!'

"And the Court on the finding of the jury, shall give such judgment as the law requires; and if a jury be not so demanded the Court shall try and be the absolute judges as well of the facts as of the law in respect to such conviction or decision; but no witness shall in either case be examined who was not examined before the Justice or Justices at the hearing of the case."

opinion within the subject numbered 27, reserved for the jurisdiction of the Dominion Parliament, namely, "criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." The conferring power upon the parties to an appeal in criminal matters to dispense with the jury if they think fit, and to submit themselves to the judgment of the Court of General Sessions without a jury, cannot be said to interfere with the "constitution" of the Court.

I think, moreover, that the respondent, who insisted upon the trial without a jury, cannot be heard now to complain of his own act.

[The remainder of the judgment having no reference to the constitutional question is omitted.]

Rule nisi discharged (1).

(1) Subsequently an application was made for a rule *nisi* to re-hear the foregoing decision, but after consideration on November 30th, 1876, the rule was refused. The judgment is not reported.

ONTARIO COURT OF QUEEN'S BENCH.

1878*
March 15.

REGINA *v.* PRITTIE.

[*Reported 42 U. C. Q. B. 612.*]

Temperance Act of 1864—Municipal Institutions—Master of a merely local nature.

The Temperance Act, 1864, of the late Province of Canada, prohibited the sale of liquors by retail wherever the Act was brought into force, and provided special proceedings and punishments for offences against the Act; the Provincial Legislature of Ontario afterwards enacted that the sale of liquor in such localities should be also a contravention of the Provincial Acts for selling without a license; these Acts provided other punishments and proceedings.

Held, that under the Temperance Act the matter was one of criminal law: and that the legislation of the Provincial Legislature was *ultra vires*.

On November 23rd, 1877, Mr. Justice Gwynne, on motion of Mr. *H. J. Scott*, granted a rule calling on the prosecutor, Charles C. Pearce, and George Spencer, the Police Magistrate for the town of Owen Sound, the convicting magistrate, to shew cause before the full Court in Term, why a conviction, or a pretended conviction, made by the said George Spencer, on the information of the said Charles C. Pearce, whereby the applicant, William H. Prittie, was convicted, for that he, at the town of Owen Sound, in the County of Grey, on the 4th of August, 1877, did, in his house of public entertainment in the said town, known as the Queen's Hotel, unlawfully keep and have fermented liquors for the purpose of selling, bartering or trading therein without the license therefor

*Present:—HARRISON, C. J., and WILSON and ARMOUR, JJ.

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STATEMENT.

by law required, and which said conviction, or pretended conviction, was made on the 21st of August, 1877, should not be quashed and set aside, in whole or in part, with costs, upon various grounds, of which the third was:

That the Legislature of Ontario has no power in any way to interfere with the provisions of the Temperance Act of 1864, such powers belonging only to the Parliament of the Dominion of Canada, and any attempted interference on the part of the said Legislature was *ultra vires* and void, and s. 30 of 40 Vict. c. 18 (1), was, and is *ultra vires* and void.

The Dunkin Act was proved to be in force in the Town of Owen Sound.

The conviction was on the ground that he, the said William H. Prittie, on the 4th day of August, 1877, at the said town of Owen Sound, in his house of public entertainment, known as the Queen's Hotel, did unlawfully keep liquor for the purpose of sale, barter, and traffic therein, without the license therefor by law required.

Mr. *J. K. Kerr*, Q.C., shewed cause.

The Ontario Legislature can deal with the Dunkin Act, *In re Mottashed and Corporation of Prince Edward*(2); *Re Lake and County of Prince Edward* (3). And the Ontario Legislature can also deal with that Act to a very great extent as connected with Municipal Institutions, *Regina*

(1) 40 Vict. c. 18, s. 30: "The sale of liquor without license in any municipality where 'The Temperance Act of 1864' is in force shall nevertheless be a contravention of sections twenty-four and twenty-five of the said Act, thirty-seventh Victoria, chapter thirty-two; and the several provisions of the said recited Acts, and of this Act, shall have full force and effect in every such municipality except in so far as such provisions relate to granting licenses for the sale of liquor by retail.

"(2) A wholesale license to be obtained under and subject to the provisions of the said recited Acts, and of this Act, shall be necessary, in order to authorize or make lawful any sale of liquor in the quantities allowed under the provisions of 'The Temperance Act of 1864.'"

(2) 30 U. C. Q. B. 74.

(3) 26 U. C. C. P. 173.

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ARGUMENT.

v. *Taylor* (1); *Graham* v. *McArthur* (2). It is then objected by the defendant, if this conviction be under the Licensing Acts only, that there is no power to prosecute under these Acts, and to punish under the Act of 1864; that such a course is an assumption to control criminal proceedings by the Ontario Legislature, *Regina* v. *Boardman* (3), and other cases shew it is not so. He also referred to *Reg.* v. *Lake* (4); *Michell* v. *Brown* (5); *Paley* on Convictions, 5th ed., 152; *Dwarris* on Statutes, 2nd ed., 532; *Re Baker* (6); *Martin* v. *Pridgeon* (7); *Whitehead* v. *Smithers* (8); *Cooley* v. *Smith* (9); *McCulloch* v. *Maryland* (10); *Ex parte Duncan* (11); *Cooley* on Const. Law, 57, 63.

Mr. *Robinson*, Q.C., and Mr. *H. J. Scott*, contra.

The Act of 1864, so far as it affects the sale of liquor, or the having it for sale affects trade and commerce, and is not within the jurisdiction of the Ontario Legislature. When the Dominion Parliament deals with a subject within its powers, and imposes fines, and directs a particular course of proceeding for enforcing the enactment, the Provincial Legislature cannot interfere with these proceedings or penalties, or with anything which would affect or defeat the Dominion Legislation, B. N. A. Act, s. 92, sub-s. 15. The 40 Vict. c. 18, s. 30, O., does expressly interfere with the provisions of the Act of 1864, by providing that different proceedings and different penalties shall be taken and imposed than are provided by that Act. This is a conviction by the very terms of it under the Licensing Acts. The prosecutor declared he

(1) 36 U. C. Q. B. 183, 206, 207, 212.
(2) 25 U. C. Q. B. 478, 483.
(3) 30 U. C. Q. B. 553; *ante*, vol. 1, p. 676.
(4) 7 Pr. Rep. 215; *post*, p. 619.
(5) 1 E. & E. 267.
(6) 2 H. & N. 219, 244.
(7) 1 E. & E. 778.
(8) 2 C. P. D. 553, 558.
(9) 40 U. C. Q. B. 543.
(10) 4 Wheaton, 316, 428.
(11) 16 L. C. J. 188; *ante*, p. 297.

was so proceeding. The 37 Vict. c. 32, s. 50, O., provides for a certain state of things being presumed from the existence of certain facts. Under that Act the prosecutor proves his case by virtue of that section, and a conviction is made under the Act of 1864, upon that presumption as evidence, although that Act contains no such provision as to that kind of evidence or presumption which had been used to obtain that conviction. Section 50 just mentioned goes far beyond section 25 of the Act of 1864. There is no appeal by the Act of 1864 to quash a conviction under it. The 37 Vict. c. 32, s. 25, prevents the keeping of liquors for sale, and the conviction is founded upon that section. But that section differs from sect. 13 of the Act of 1864. The Act just named has no cumulative punishments. The conviction is not warranted by sections 30, 31, and 32 of the Act of 1864. The two Acts cannot subsist together at the same time and place, *Graham* v. *McArthur* (1); and yet the 39 Vict. c. 26, s. 27, O., and 40 Vict. c. 18, s. 30, declare that these Acts shall not affect the Act of 1864, but that they shall all continue operative together at the same time and place. They also referred to *Reg.* v. *Boardman* (2); *Re Bates* (3); *Reg.* v. *Hoggard* (4).

The judgment of the Court was delivered by

WILSON, J.:—

It may require to be considered yet whether the legislation with respect to the Temperance Acts of 1864 and of Ontario, are an interference with the powers of the Dominion Parliament which are conferred upon them by the B. N. A. Act to deal exclusively with matters of trade and commerce.

(1) 25 U. C. Q. B, 478.
(2) 30 U. C. Q. B. 553.
(3) 42 U. C. Q. B. 284.
(4) 30 U. C. Q. B. 152, 157.

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And if it be, then it must be considered whether the power to interfere to that extent has not been conferred by the same Imperial Statute upon the Ontario Legislature to deal with that subject and to that extent as connected with and relating to municipal institutions over which the Provincial Legislature has exclusive jurisdiction ; inasmuch as these municipal bodies had, at the time the Confederation Act was passed and took effect, the express legislative right by the law of Canada to deal with the sale and keeping of spirituous liquors in the manner and to the extent before mentioned.

If it be held that the Ontario Legislature acquired that power, it must then be considered whether that was and is an indefeasible right which the Dominion Parliament cannot interfere with or encroach upon. Or whether it was and is a power which was given, and which is to be exercised so long only as the Dominion Parliament has not and does not, under its jurisdiction over trade and commerce, pass any conflicting and repugnant law to it, and which is to cease when, or be suspended so long as such opposing enactment is maintained.

It must also be considered whether the power in the Dominion Parliament to regulate trade and commerce, and the power of the Ontario Legislature through the instrumentality of municipal institutions to deal with spirituous liquors according to the provisions of the Temperance Act are irreconcilable powers, and must necessarily lead to a conflict of jurisdiction.

That they are antagonistic is manifest ; but it may be they are not wholly irreconcilable. It will be observed that the power which Ontario has over the subject is not that it may by its own enactments declare that the provisions of the Temperance Act shall be in force throughout the Province, or in any particular part or parts of it; but that the respective municipal bodies may pass by-laws

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on the subject which must before they can take effect be approved of by a majority of the electors of each municipality.

If the Ontario Legislature had the power to impose by its own direct legislation a law upon the country creating and enforcing the terms of the Temperance Acts, such a statute might be irreconcilable with the Dominion authority to deal with trade and commerce.

But it may not be the same thing when the whole of the power which Ontario has so far exercised is to leave and permit each municipality to put the law into force, and then only after a popular vote upon the by-law approving of it.

It may be said there can be no difference in principle between the two modes of dealing with the subject, but it may be urged with much reason that there is. In the nature of things it is scarcely possible, and as a fact it is quite improbable, that the Temperance Acts can ever be put in force in the whole Province at the one time, or even over any considerable part of it, so long as a popular approving vote is required in each municipality before the Act can take effect.

And it may be contended that, if the enforcement of the Temperance Acts be an infringement and encroachment upon the power over trade and commerce, that the Imperial Parliament was quite willing to leave that power with the different municipal bodies still to deal with the subject in question to the extent and subject to the restrictions which the then existing law of the country provided for.

If, however, the exercise of these duplicate powers cannot be maintained because they are a direct interference with trade and commerce, then it must be further considered whether, although an interference with trade

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and commerce to some extent, and perhaps to a serious extent, the power of the Province cannot, nevertheless, be maintained to authorize the municipalities to put the provisions of the Temperance Act into force as at present, upon the ground that such an Act is a valid exercise of police power inherent in, and inseparable from, the due administration of civil rights and of matters of a merely local or private nature.

Much may, no doubt, be said on this view of the subject. The argument against the law, as it stands at present, may be, that prohibition to sell such liquors in quantities of not less than so considerable a measure as five gallons or one dozen bottles at a time, is too excessive a prohibition to be a mere police regulation, and that it is in reality a regulation of trade and commerce. And it may also be argued that the prohibition which excludes all but merchants and traders at their actual places of business from selling even in such quantities, and also all but brewers and distillers (if the decision of the Supreme Court shall stand) from selling in the like quantities, excludes too numerous a class of persons to be a regulation for the mere purposes of police.

I am at present indicating only and very generally the powers which have yet to be considered upon this difficult, perplexing, and very important subject, before the Parliament, the Legislature or the Courts can proceed safely to deal with either the public interests or with private rights or responsibilities under these Temperance Acts. I have not been obliged to consider these questions at the present time, because assuming the Temperance Act to be in force, as Mr. *Kerr* contended, and I may assume that, on his argument, I am able to dispose of the motion before us upon other grounds. But, I am sure we shall be forced to entertain them and deal with them at no distant day, and all we can do will be to exercise our

judgment upon them to the best of our ability, whenever they do arise.

[The learned Judge then examined the different provisions of the Temperance Act of 1864 and the Ontario Licensing Acts, and proceeded as follows (p. 622):]

As the Ontario Legislature has power over shop, saloon, and tavern licenses, they had the power to require that a license should be taken out under the Act of 1864, to authorize a sale by wholesale, as allowed by that Act. The license would authorize a merchant or trader to sell not less than five gallons or one dozen bottles; and selling without a license under that Act, the license being required by the 40 Vict. c. 18, s. 30, sub-s. 2, O., would mean that the merchant or trader was selling by wholesale without a license.

If he was selling less than these quantities, a license would be no protection to him, and his offence would not consist in selling without the license therefor required by law, but in selling contrary to the statute, that is by selling at all, or contrary to the terms of his license, in smaller quantities than he was licensed to sell.

In this case, I think it appears sufficiently, that the defendant was convicted for keeping liquor in a place where there were licenses required to enable him to keep it for sale, and where it would have been lawful for him to keep it if he had been licensed—that is, that he was acting in violation of the Licensing Acts, by keeping liquor without the proper license, whereas, the fact was, he was keeping the liquor in a place where the Temperance Act was in force, and while and where he could not be licensed to keep liquor in his hotel under any circumstances. He was not, therefore, properly convicted for keeping the liquor without the license therefor required by law. He should have been convicted for keeping the liquor for sale contrary to sect. 12 of the Temperance

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Act, which forbids its being kept, and which no license could sanction so long as the Act was in force.

The applicant has, in truth, been convicted under 37 Vict. c. 32, s. 25, O., which is a Licensing Act, for an offence against the Act of 1864. There are costs imposed upon the applicant besides the fine which is sanctioned by the Act of 1874, but not by the Act of 1864. The offence, under the Licensing Acts, may be used against the applicant on a second or third conviction under such Acts, while the conviction under the Act of 1864, cannot be used for the purpose of enhancing the punishment in case of the applicant being hereafter convicted under the Licensing Acts.

There is an appeal allowed under the Licensing Acts, but not under the Act of 1864, from a police magistrate, such as this is, and the applicant is entitled to know whether he is convicted for an offence and under a statute which permits an appeal to him or not.

There is also a different rule of evidence allowed under 37 Vict. c. 32, s. 50, in cases under that Act, which is not allowable in cases under the Act of 1864.

And there is the further objection which I referred to, in *Regina* v. *Lake* (1), that the conviction is under the Licensing Acts, for an offence alleged to be against these Acts, while in fact, it is against the Temperance Act, and that proceeding is assumed to be justified by the 40 Vict. c. 18, s. 30, above quoted.

But, in my opinion, the Ontario Legislature has not the power to make the provisions of the Licensing Acts "have full force and effect" in a municipality where the Temperance Act is in force, so as to make an offence against the one Act an offence against the other Act. That is direct legislation upon criminal law and procedure in criminal matters, which is not in any way

(1) 7 Pr. Rep., Ont., 215; *post*, p. 619.

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necessary for the due exercise of their own proper power.

Why is not the party to be convicted under the statute and for the violation of the statute he has contravened? Why is he, because he has done an act against one statute, to be prosecuted for breaking another he has never infringed?

I think that cannot be done. I am of opinion, then, that the conviction must be quashed for the reasons mentioned.

HARRISON, C. J., and ARMOUR, J., concurred.

Conviction quashed. (1)

(1) [See next case.]

ONTARIO COURT OF QUEEN'S BENCH.

1878*
March 18.

REGINA *v.* LAKE.

[*Reported 43 U. C. Q. B. 515.*]

Temperance Act of 1864—Criminal Procedure.

The Temperance Act, 1864, of the late Province of Canada prohibited the sale of liquors by retail wherever the Act was brought into force, and provided special proceedings and punishments for offences against the Act; the Provincial Legislature of Ontario afterwards enacted that the sale of liquor in such localities should be also a contravention of the Provincial Acts for selling without a license; these Acts provided other punishments and proceedings.

Held, that under the Temperance Act the matter was one of criminal law, and that the legislation of the Provincial Legislature was *ultra vires*.

This was a motion by way of appeal from the judgment of Wilson, J., in Chambers, discharging an application for a writ of *habeas corpus* to discharge the defendant from the custody of the sheriff of the County of Prince Edward, committed under a conviction and warrant for selling intoxicating liquor contrary to sect. 24 of the Ontario Act entitled "An Act to amend and consolidate the law for the sale of fermented and spirituous liquors."

The conviction was that the defendant "on the 31st July, 1877, at the Town of Picton, in the premises occupied by him, did sell intoxicating liquor, to wit, one glass of strong beer, being malt liquor, without the license therefor by law required, and being a violation of the 24th section of the Act entitled 'An Act to amend and con-

*Present:—HARRISON, C. J., and WILSON and ARMOUR, JJ.

solidate the law for the sale of fermented and spirituous liquor,' (see 37 Vict. c. 32, O.)," etc.

No cause having been shewn, Mr. *Ferguson*, Q.C., and Mr. *Burdett*, supported the rule. The following authorities were referred to: *Reg.* v. *Roddy* (1); *Copley* v. *Burton* (2); *Clarke's* Criminal Law, 450, 451; *Bancroft* v. *Mitchell* (3); *Michell* v. *Brown* (4); *Reg* v. *Hoggard* (5); *Re Lucas & McGlashan* (6); *Bross* v. *Huber* (7); *Reg.* v. *French* (8).

ARMOUR, J.:—

All the facts and circumstances in any way affecting this conviction, and all the questions raised as to its validity, have been so fully set forth and discussed in the judgment appealed from, that I shall content myself by stating as shortly as possible the conclusion at which I have arrived regarding it. The principal question as to its validity seems to me to turn upon the construction to be placed upon 40 Vict. c. 18, s. 30, O. (9), and upon the power of the Local Legislature to enact it.

It is quite clear that the Legislature intended either to confine that section to requiring a wholesale license to be taken out for the sale of liquor in the quantities allowed to be sold under the provisions of the Temperance Act of

(1) 41 U. C. Q. B. 291.
(2) L. R. 5 C. P. 489.
(3) L. R. 2 Q. B. 549.
(4) 1 E. & E. 267.
(5) 30 U. C. Q. B. 152.
(6) 29 U. C. Q. B. 81.
(7) 18 U. C. Q. B. 282.
(8) 34 U. C. Q. B. 403.
(9) 40 Vict. c. 18, s. 30: "The sale of liquor without license in any municipality where 'The Temperance Act of 1864' is in force shall nevertheless be a contravention of sections 24 and 25 of the said Act, 37th Vict. c. 32; and the several provisions of the said recited Acts and of this Act, shall have full force and effect in every such municipality except in so far as such provisions relate to granting licenses for the sale of liquor by retail.

"(2) A wholesale license, to be obtained under and subject to the provisions of the said recited Acts, and of this Act, shall be necessary in order to authorize or make lawful any sale of liquor in the quantities allowed under the provisions of 'The Temperance Act of 1864.'"

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1864 in municipalities where that Act is in force, and to providing that a sale in such municipalities of such quantities without such license should be a contravention of 37 Vict. c. 32, ss. 24 and 25, O. (1), as a selling by wholesale without license; or they intended not only to do that, but also to provide that a sale in such municipalities of quantities prohibited by law to be sold therein by the Temperance Act of 1864, should be a contravention of 37 Vict. c. 32, ss. 24 and 25, O., as a selling by retail without license, and that, too, although they had already provided by 39 Vict. c. 26, s. 27, O., that no license to sell by retail should be granted to take effect in such municipalities.

If the former only was the intention of the Legislature, then the conviction in question is bad, for it is selling by retail under a provision of the License Act not in force where the conviction was made: *Graham* v. *McArthur* (2).

If the latter was their intention, I think that they were exceeding their powers. They were, by so doing, directly legislating upon criminal law, and enacting criminal procedure for the punishment of offences against the Temperance Act of 1864.

In my opinion the rule should be made absolute, except in so far as it seeks to quash the warrant of commitment, which must stand as a protection to the officers who acted under it.

HARRISON, C. J., concurred.

(1) 37 Vict. c. 32, s 24: "No person shall sell by wholesale or retail any spirituous, fermented or other manufactured liquors within the Province of Ontorio without having first obtained a license under this Act authorizing him so to do: Provided that this section shall not apply to sales under legal process, or for distress, or sales by assignees in insolvency." Sect. 25: "No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented or other manufactured liquors for the purpose of selling, bartering or trading therein unless duly licensed thereto under the provisions of this Act."

(2) 25 U. C. Q. B. 478.

WILSON, J.:—

Said he also concurred, because the judgment given by the Court was the judgment he would have given while sitting alone if he had been obliged to give a conclusive judgment. He, in fact, while the case was before himself, left matters as they were, and referred the cause to the full Court.

Rule accordingly. (1)

JUDGMENT OF WILSON, J., (*before whom the case came in the first instance*).

[*Reported 7 Pr. Rep. 215.*]

WILSON, J.:—

The proceedings shew plainly, as Mr. *Scott* admitted on the argument, that the conviction could not be sustained under the Temperance Act of 1864.

The complaint is, that the defendant sold intoxicating liquor without a license, and not as in the form in the Temperance Act schedule C, that he did so "contrary to the Temperance Act of 1864."

The conviction expressly alleges that the offence was committed against the 37 Vict. c. 32, s. 24, O., and the imprisonment awarded in case of non-payment of the fine is fifteen days, while by the Temperance Act, sect. 32, it should have been for a time "not less than one nor more than three months," and it imposes hard labour with the imprisonment, while sect. 32 does not authorize it.

The case cannot be considered as having been brought or prosecuted under that Act, although the Act was in force at the time of the alleged committing of the offence, and for some time before, in the county of Prince Edward, and although the offence was committed in violation of that Act, and there are special penalties and punishments provided for its infraction. The prosecution was in fact begun, and carried on under the 37 Vict. c. 32, and was so intended; and the principal objections which are taken to the proceedings so taken under that Act are: 1. That the offence was not in fact one committed against that Act, because that is a statute for

(1) [See preceding case.]

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the authorization of the sale of intoxicating liquors by retail, and for the punishment of those who sell without such a license, whereas there is no such licensing system in force under that statute in the county of Prince Edward, and the defendant could not therefore violate that Act; but, on the contrary, there is a prohibition of all sale of such liquors by *retail* in the county, excepting for medicinal purposes, etc., and for which no license is required; and the defendant should therefore, have been proceeded against for selling intoxicating liquors contrary to the Temperance Act of 1864, and not for selling without a license, as in such a case there could be no license; and 2. That under the 37 Vict. c. 32, O., for the first offence, which this is, there can be no hard labour imposed accompanying the imprisonment.

If these are, or if either of them is a valid and incurable objection, the defendant must be discharged from custody.

But it was answered, as to the first of these objections, that although the Temperance Act is in force, where a sale contrary to it of intoxicating liquors has been made the offence may be prosecuted as a sale made without a license to sell, and the proceedings may be carried on under the Licensing Acts, and need not be taken under the Temperance Act; and *McArthur* v. *Graham*, (1), was referred to for that purpose. And it was further insisted that now by the 40 Vict. c. 18, s. 30, O., it is expressly declared that the sale of liquor without license in any municipality where the Temperance Act is in force shall be a contravention of sect. 24 of the 37 Vict. c. 32, and that the several provisions of the said recited Acts, and of the 40 Vict. c. 18, shall have full force and effect in such municipality, except in so far as such provisions relate to granting licenses for the sale of liquor by retail. And by sub-sect. 2 of the same Act it is now provided that there shall be a wholesale license required in such a municipality for the sale of liquor in the quantities which are allowed by the Temperance Act.

And to the second objection it was said that the 40 Vict. c. 18, schedule C, allowed the hard labour to be superadded to the imprisonment, but if it did not, the conviction and warrant could, by sect. 23 and its sub-section, be amended by me if necessary, but the same was not to be quashed.

The question is, whether the answers so made to the objections, which objections are *prima facie* fatal to the validity of the proceedings, are sufficient to prevent the discharge of the defendant.

(1) 25 U. C. Q. B. 478.

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The first objection is not removed by *McArthur* v. *Graham* (1). In that case the Temperance Act of 1864 was in force in the township of Lobo, and the warrant of commitment stated the selling of liquor complained of to have been contrary to the 28th Vict. c. 22, the then Licensing Act. The Chief Justice spoke as follows: "The important question is, whether the selling spirituous liquors by the plaintiff without license, of which offence the plaintiff was convicted, was, upon the facts proved, an offence against the 28 Vict. c. 22, or against the Temperance Act of 1864. If the former, the defendant had jurisdiction sitting alone, though he had no power to commit to hard labour; if the latter, he had no authority as a single justice to convict; and we think the latter the right conclusion."

The Chief Justice, in putting the question in that form, appears to have assumed that a conviction for selling *without license* rightly described the offence of selling where the Temperance Act was in force, and he then decides that it is not optional with the prosecutor in such a case to elect whether he will proceed under the one Act or the other: that in that case he was compelled to proceed under the Temperance Act, because that was the only statute which was then in force in that locality, and while it was in force the Licensing Act was suspended.

It is not a decision that the offence in such a case may be and is properly described as the selling without license. It assumes throughout that it is such an act, and that it is so rightly described; and it is strange that it is assumed to be so, although the conviction describes the offence to have been committed "contrary to the 28 Vict. c 22," the Licensing Act.

A selling in such a case *without license* refers to a wholly different condition of things where and when the Temperance Act is in force, than the selling at such a time and place where the prohibition to sell by retail is absolute, and there is and can be no such license to sell by retail at all; and at that time there was no license to sell either wholesale or by retail. That is for the first time provided for by the 40 Vict. c. 18, as to sales by wholesale.

It appears to me that selling *without a license* means necessarily that there may be a sale in that locality at that time with a license, and that the party charged is infringing the special provisions which require there shall be a license to authorize the sale. It cannot mean that the sale was wholly prohibited, and that a license to sell would have been and was of no avail, and it is not as

(1) 25 U. C. Q. B. 478.

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if the words *without a license* were mere surplusage, and of no meaning, for they most appropriately describe an offence relating to offences against the License Acts. Such language not only does not describe such an offence accurately, it misdescribes it.

In *Regina* v. *Hoggard* (1), the Chief Justice said: "Is the offence of which the defendant is convicted for selling without a license, or having a license is he convicted for selling the liquor during the hours within which it is forbidden by law to be sold? In either case he would be selling contrary to law. The authorities seem clear that the charge must be certain, and so stated that if prosecuted again for the same offence, he may plead the former conviction . . . There being so much uncertainty about the matter, nothing being said either in the complaint, evidence, or conviction, whether the defendant had a license or not, we think the second conviction cannot be sustained either."

In the case of *In re Baker* (2), Martin, B., said: "It is a matter of right that a person should know under what Act of Parliament he is convicted, and if the Justice meant to convict under the 6 Geo. III., c. 25, he should say so, in order that the party may have the opportunity of appealing. If the justice does not, the conviction is bad, for the party is deprived of a right which he has under the one Act, but not under the other. I cannot think it a proper mode of carrying the law into effect to shift back from one Act of Parliament to another, and say that if the conviction is not good under this Act, it is under that."

And in *McArthur* v. *Graham* (3), the Chief Justice said: "The minimum of penalty, and both minimum and maximum of imprisonment, differ in the two Acts." So that such a difference, independently of the fact that the conviction expressly stated that the party was charged for violating the License Act, was a sufficient reason for not assuming that the offence in that case was rightly described as an infringement of the Temperance Act.

The rule of pleading, as stated in *Arch.* Criminal Pleading, 18th ed., p. 54, is that an indictment for an offence against a statute must, with certainty and precision, charge the defendant to have committed or omitted the acts under the circumstances and with the intent mentioned in the statute; any if any one of those ingredients in the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error.

(1) 30 U. C. Q. B. 152, 157. (2) 2 H. & N. 216, 244.
(3) 25 U. C. Q. B. 478.

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Here the offence the defendant committed was that he sold intoxicating liquor by retail in a place where such a sale was totally prohibited, excepting for medicinal purposes, etc., which are duly excepted in the conviction, and where a license could not be granted to any one to sell by retail; and the conviction does not show the offence was committed in a locality where the sale of liquor by retail was prohibited, nor does it describe it as having been committed "contrary to the Temperance Act of 1864," which the form of the Act schedule E, read in connection with the form of complaint in schedule C requires should be done: but it describes an offence of a particular description selling by retail without license, which is expressly covered and governed by a different Act and for a different state of things than that which applied here; and in addition to that the conviction expressly declares that the offence was committed under such different Act and under such different circumstances than the Act which alone can warrant such a conviction.

I am of opinion that the conviction cannot be supported at the common law, and it is not supported by the decision in *McArthur* v. *Graham* (1). Can it then be supported under the 40 Vict. c. 18, s. 30? "The sale of liquor without license in any municipality where 'The Temperance Act of 1864' is in force, shall, nevertheless, be a contravention of sections twenty-four and twenty-five of the said Act, 37 Vict. c. 32; and the several provisions of the said recited Acts, and of this Act, shall have full force and effect in every such municipality, except in so far as such provisions relate to granting licenses for the sale of liquor by retail." Sub-sect. 2 requires a wholesale license to be obtained to "make lawful any sale of liquor in the quantities allowed under the provisions of "The Temperance Act of 1864.'"

A wholesale license by the 40 Vict. c. 18, is now required to be taken out in municipalities where the Temperance Act is in force. And there is *now* such an act as selling liquor *without license* contrary to the Temperance Act.

The sale of liquor *without license* in any municipality where the Temperance Act of 1864 is in force under sect. 30, just mentioned, does most plainly apply to *wholesale* licenses provided for now by sub-sect. 2 just mentioned; and as there was no license before the last mentioned Act required for sales by wholesale under the Temperance Act, and as they were not prohibited or affected by it, there

(1) 25 U. C. Q. B. 478.

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is nothing in that Act as to selling by *wholesale* opposed to the enactments of the licensing statutes: and selling by *wholesale* without license may plainly, and without any repugnancy, be offences against ss. 24 and 25 of the 37 Vict. c. 32, as referred to in the 40 Vict. c. 18, s. 30, above mentioned, if made without license, even in places where the Temperance Act is in force.

Does sect. 30 of the Act of 1877 apply to selling by retail—that is, to acts which are prohibited by the Temperance Act, in places where it is in force?

Section 30 not only declares that the sale of liquor without license in any place where the Temperance Act is in force, shall be a contravention of 37 Vict. c. 32, ss. 24 and 25, but it declares that "the several provisions of the said recited Acts (37 Vict. c 32, and 39 Vict. c. 26,—the licensing Acts) and of this Act, shall have full force and effect in every such municipality, except in so far as such provisions relate to the granting licenses for the sale of liquor by retail."

It cannot, therefore, be denied that the licensing Acts are now by this last statute in full force and effect in any municipality where the Temperance Act is in force, excepting those provisions of the licensing Acts which relate to the granting of licenses to sell by retail. The licensing Acts are not now, as heretofore, suspended in municipalities where the Temperance Act is in force. They are in force in such places equally and co-operatively with the Temperance Act itself, not only as regards sales by wholesale, but in all respects, except in so far as such provisions rela e to granting licenses for the sale of liquor by retail.

The effect of that, it is said, is to subject a party offending against the Temperance Act, and who is liable to the penalties under it, to be prosecuted as for an offence under the licensing Acts, and to be punished under them—that is, a person who sells by retail in a municipality where there are no licenses so to sell may be proceeded against as for selling without a license contrary to the licensing Acts. That general mode of legislation may create some confusion where the penalties or mode of proceeding and time of prosecution may be different; and it may also require consideration, whether it is not an interference with "Criminal Law including the procedure in criminal matters," which is solely vested in the Dominion Parliament. It is subjecting a person who is punishable for an offence, which is specially provided by statute for that particular offence, to a punishment under a different statute, for a different offence than

that of which he is guilty. It is just the same as if it were declared that all the provisions of the Vagrant Act should have full force and effect in municipalities in which the Temperance Act is in force ; and as if proceedings were authorized to be taken against those persons who had violated the Temperance Act under the Vagrants' Act, and to punish them as vagrants, without regard to the special procedure and punishment provided by the Temperance Act, which alone they had violated. There is also some confusion created by giving the election to the prosecutor to carry on his proceedings for a violation of the one Act under either of these other Acts.

The penalty under the Temperance Act in this case is a fine of not less than $20, nor more than $50 : Sect. 13.

The prosecution is to be commenced within three months: Sect. 15.

The depositions are to be reduced to writing, if the justices or if either party required it : Sect. 23.

The witnesses are bound to answer even criminating questions : Sect. 28.

The justices may make special enquiries of the defendant as to his goods and chattels before issuing a distress warrant. If the defendant shews there is no property available for seizure, or if he refuses to answer, or answers not to the satisfaction of the justices, he may be imprisoned for not less than one month, nor more than three months, but he may be discharged on paying the fine and costs : Sect. 30.

If the defendant is not present at the time of giving judgment, and it appears to the justices by affidavit that a distress warrant would be likely to fail in realizing the penalty or costs, the justices may forthwith issue their warrant and imprison the party for not less than one nor more than three months, but he may at any time be discharged upon paying the amount and all costs : Sect. 31.

If the justices do not interrogate the defendant, being present, or if he be interrogated, and he shews that he has a sufficiency of goods, or if in his absence it is not shewn that the issue of a distress warrant would be likely to fail of realizing the amount, then the justices, in default of immediate payment, may issue their distress warrant, and in default of goods, or a sufficiency of goods to satisfy the amount, they may issue their warrant to imprison the defendant for not less than one nor more than three months, but the defendant may at any time be discharged on paying the amount and all costs : Sect. 32.

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There is a special application of the penalties : Sect. 34.

There is an appeal when the conviction is by two justices, and the conviction, etc., may be removed by *certiorari* : Sect. 36.

By the 37 Vict. c. 32, the penalty for the first offence is not less than $20 nor more than $50 : Sect. 35.

The penalties are to be applied differently from the manner provided by the Temperance Act : Sect. 43 ; 39 Vict. c 26, ss. 18, 19.

By 48 Vict. c. 18, s. 20, sub-s. 2, the evidence in all cases shall be reduced to writing, and read to the witnesses and signed by them.

The complaint must be made within thirty days after the commission of the offence : Sect. 21.

There is no appeal to the Sessions, nor to any Court except to the Judge of the County Court : Sect. 21, sub-ss. 3, 4.

Hard labour is not imposed by the Temperance Act, nor by the 37 Vict. c. 35, but schedules E and C of 40 Vict. c. 18, impose it in such a case as this, if that imposition by *schedule* be sufficient.

If there is no unconstitutionality in this case, there are two sets of statutes in operation at this time in the County of Prince Edward which are very much opposed to each other, under either of which the defendant may be convicted. That is just what is contended on the part of the prosecution has been done, and, as it is said, rightly done.

The conviction, it is said, is founded upon the 37 Vict. c. 32, s. 24. If so, as that Act does not provide for any imprisonment for the first offence under the 35th section, which relates by amendment to the 24th section, the Act of 1869, c. 31, s. 62, will apply, and by it the imprisonment is not to exceed three months, but there is no authority there for the hard labour which has been imposed upon the defendant. Assuming for the present that the conviction is rightly made under the 37 Vict. c. 31, which does not authorize hard labour, is the imposition of it warranted by the 40 Vict. c. 18, schedule E and C ? For that is the only place where hard labour is mentioned.

Section 36 enacts that the forms in the schedules shall be sufficient in the cases thereby respectively provided for ; and schedule C is headed as follows: "Warrant of commitment for first offence where a penalty is imposed." It recites the conviction, and

that the justices imposed a penalty, and awarded imprisonment with hard labour for such a time, and then it commands that the party be imprisoned accordingly.

The form is also made to apply to a case where a warrant has issued against goods, which has not been satisfied, and then the order is made for imprisonment with hard labour.

Schedule E, which is headed, "Form of conviction for first offence." That, after reciting the adjudication of guilt and the imposition of the penalty, and the issuing and return of a distress warrant not satisfied, proceeds to award that the party be imprisoned for the time named with hard labour.

I think it is impossible to hold that the section of the Act, declaring that the forms in the schedules shall be sufficient in the cases thereby respectively provided for, can be considered as equivalent to an express legislative enactment that an offence which has not been made liable to be punished with hard labour superadded to imprisonment, shall be read as if the Legislature had imposed hard labour, because the form given in the schedule states the conviction to be that the imprisonment is with hard labour.

It is said in *Dore* v. *Gray* (1), per Ashhurst, J., "For the bare recital in a statute is not sufficient to repeal the positive provisions of a former statute, without a clause of repeal." And the section just referred to can be placed no higher than a mere recital. There is no express legislative enactment that hard labour shall be given in such a case; and it is not to be presumed that so great a change in the law was intended to be effected by such language as that which is contained in the 30th section of that Act, and by the drafting of a form at the end of the Act which includes hard labour.

Independently of the 40 Vict. c. 18, and its authority to sanction hard labour in a case like this, the conviction does not profess to be founded upon the last named Act, as it expressly states the 37 Vict. c, 32, s. 24, as the Act upon which it is founded, and that statute does not authorize the addition of hard labour. But it is said the conviction and warrant may be amended by striking out that addition to the punishment from them.

There are various statutory provisions as to objections to proceedings in summary prosecutions.

(1) 2 T. R. 358, 365.

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The 32 & 33 Vict. c. 31, s. 5, D., enacts that "no objection shall be allowed to any information, complaint, or summons, for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced on the part of the informant or complainant at the hearing;" but if it appears to the Justice that the defendant has been misled, he may adjourn the case to a future day.

Sect. 12 enacts the like as to warrants to apprehend. So by sect. 21 any variance between the information and evidence as to time or place shall not be material.

By sect. 68, in appeal, the Court shall try the case on the merits notwithstanding any defect of form or otherwise, and if the party is found guilty in appeal, the Court shall, if necessary, amend the conviction. As to same matter, see 38 Vict. c. 11, s. 11, O.

The 33 Vict. c. 27, s. 2, D., provides that no conviction or order affirmed, or affirmed and amended in appeal, shall be quashed for want of form or be removed by *certiorari*, "and no warrant or commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same." See also on this point 38 Vict. c. 11, s. 13, O.

The 38 Vict. c. 11, s. 1, O., allows an appeal to the Judge of the County Court in all cases "whether any special provision is made in that behalf or not," and also when any appeal is given.

Then, by sect. 14, it is enacted that "In all cases where it appears by the conviction that the person convicted has appeared and pleaded and the merits have been tried, and that such person has not (in manner hereinbefore provided) appealed against the conviction where an appeal is allowed, or if appealed against that the conviction has been affirmed, or amended and affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case."

By 40 Vict. c. 18, s. 21, O., provision is made for amending variances between the information and evidence, and the Justice is authorized to substitute for the offence charged any other offence against the said Acts.

Sub-sect. 3 takes away an appeal to the Sessions.

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Sub-sect. 4 gives an appeal to the Judge of the County Court, and the proceedings on it shall be governed by 38 Vict. c. 11 O.

Sect. 23 enacts that, "No conviction or warrant enforcing the same, or other process or proceeding under the said recited Acts" (the Licensing Acts), "or this Act shall be held insufficient or invalid by reason of any variance between the information or conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process, or proceeding, that the same was made for an offence against some provision of the said Acts within the jurisdiction of the Justices or Police Magistrate who made or signed the same, and provided there is evidence to prove such offence, and it can be understood from such conviction, warrant, or process, that the appropriate penalty or punishment for such offence was intended to be thereby adjudged."

Sub-sect. 2: "Upon any application to quash such conviction, or warrant enforcing the same, or other process or proceeding, whether in appeal or upon *habeas corpus*, or by way of *certiorari* or otherwise, the Court or Judge to which such appeal is made, or to which such application has been made upon *habeas corpus*, or by way of *certiorari*, or otherwise, shall dispose of such appeal or application upon the merits, notwithstanding any such variance or defect as aforesaid; and in all cases where it appears that the merits have been tried, and that the conviction, warrant, process, or proceeding is sufficient and valid under this section or otherwise, such conviction, warrant, process, or proceeding shall be affirmed, or shall not be quashed (as the case may be), and such Court or Judge may, in any case, amend the same if necessary, and any conviction, warrant, process, or proceeding so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded."

Now do these enactments, or any of them, authorize the amendment asked for, and to strike out the words in the conviction and warrant "*with hard labour?*"

Under sect. 23 last mentioned, I can understand from the conviction and warrant that they were made for an offence against the provision forbidding the sale of intoxicating liquors without license, contrary to sect. 24 of the 37 Vict. c. 32, O., as extended and made applicable by 40 Vict. c. 18, s. 30, O., to the County of Prince Ed-

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ward, in which the Temperance Act of 1864 is in force, which is an offence within the jurisdiction of the two justices who made the same. And I think there was evidence to prove the offence; and if I can understand from such conviction and warrant that the appropriate penalty for such offence was intended to be thereby adjudged, then I am not to hold such conviction or warrant invalid "by reason of any defect in form or substance."

Can I understand from the conviction or warrant that the appropriate penalty for such offence was intended to be thereby adjudged?

If hard labour should have been imposed and it was omitted, or if thirty days' imprisonment could have been imposed and only half that time was given, I might more readily understand, I think, that the appropriate penalty was intended to be adjudged than where the contrary was the case.

If double the appropriate penalty has been levied by distress, or double the appropriate imprisonment has been suffered by the defendant, it is hard for me to understand that these very acts were not intended by the justices.

If the conviction shewed that it was made under a particular section of an Act which authorized a fine of $20 or imprisonment for ten days, and the penalty adjudged was $40 or the imprisonment thirty days, how could I say the magistrate intended to give the appropriate penalty or punishment when he had so plainly gone against the enactment he acted upon?

Then, again, if the statute imposing a fine does not say how it is to be levied, and resort is to be had to 31 & 33 Vict. c. 31, s. 62, as to the mode of enforcing it, and if, after a return of no goods to the distress warrant is made, the magistrate adjudges imprisonment for six months, when the statute says it should not exceed three months, it is almost impossible for me to say that the magistrate intended to award the appropriate penalty only.

As a rule it may be said that justices do always intend to give the appropriate judgment, for I cannot suppose, and do not suppose, that they intend wilfully to abuse their office by passing unjust and illegal sentences.

If I am to adopt that as a rule, I ought in every case to understand that the magistrate intended to give the appropriate penalty or punishment, however widely he may have departed from the true punishment.

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But is that the rule? Is it not rather this?—the fine should be $10, the justice has imposed $20. The imprisonment should have been ten days, the magistrate has given twenty days. Did the justice intend to impose the $20 fine, or the twenty days imprisonment?

If he did, how am I to understand that he did not intend to do it?

I do understand the justices here did intend to add the hard labour to the imprisonment, because they have done so in the conviction and warrant: but I believe they added it because they believed it to be the appropriate punishment, and that they would not have added it if they had thought they had not the power to do it. Perhaps by some straining of the language I may come to the conclusion that the justices did intend to adjudge the appropriate punishment. But that conclusion must be come to, it seems to me, in every case, however wildly the magistrate may have acted or erred. It must justify every act but an illegal and perverse abuse of power and of office.

Sub-sect. 2 of that section goes further, and it requires me on this *habeas corpus* and *certiorari* to dispose of this application on the merits, notwithstanding any defect in form or substance; and when it appears the merits have been tried, and that the conviction and warrant are sufficient under sect. 23 or otherwise, I am to affirm them, and I may amend the same if necessary.

I feel obliged, therefore, to affirm the conviction and warrant, because it appears to me the merits have been tried, and because I have come to the conclusion that the justices did intend to adjudge the appropriate penalty or punishment; and that being the case, it is right I should amend the conviction and warrant by striking out the terms of hard labour as accompanying the term of imprisonment.

I can make that amendment without difficulty; but if the justices had a discretion as to the amount of the penalty, for instance, to adjudge a fine of not more than $10, and they had awarded $20, how could I amend such an adjudication? I could not fix on the sum up to $10, which the justices would have imposed. It may be said that if they gave $20 they certainly would have given $10, but how can I tell that, they may have been misled in some way, and have believed they were obliged to give the $20, and that they had no discretion to make the sum less; and there would be a still greater

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difficulty as to the term of imprisonment, if a mistake were made as to it.

The Judge could not in such a case amend the conviction, he should have power to remit it to the justices for correction by them.

So far, then, I am of opinion the conviction and warrant are invalid at the common law by reason of the prosecution being under the Licensing Acts, while the offence was committed in contravention of the Temperance Act.

And I have very grave doubts of the power of the Ontario Legislature to enact that an offence against the Temperance Act, for which there are special proceedings and punishments provided by that Act, can be prosecuted as an offence against the Licensing Acts and punished under them, and more especially as the two classes of statutes are so very different in many of their essential enactments. But I do not give any further opinion upon that point. I assume for this case that such a statute is not unconstitutional, although, as I have said, I do most certainly doubt it.

Then assuming the power so to proceed against the defendant, I am of opinion there was no power in the justices to impose hard labour on the defendant during his imprisonment.

But under 40 Vict. c. 18, s. 23, O., and its sub-section, it may be validated, and I do so, and it may be affirmed, and I do so by striking out the words *with hard labour* from the conviction and warrant of imprisonment.

The defendant also contended that his imprisonment was illegal, because he had appealed to the Sessions. That is the proper appeal under the Temperance Act, but under the Licensing Acts the appeal is to the Judge of the County Court, and that is one of the difficulties occasioned by the strange amalgamation of these two very different kinds of statutory provisions. But if that may be done, as I have intimated it is possible it may, although I doubt it, then the appeal should have been to the County Court Judge, and not to the General Sessions, which is the appeal the defendant has made, and I therefore hold that his appeal is no appeal.

As to the defendant having a sufficiency of goods, and therefore the warrant of imprisonment should not have been awarded against him, the defendant may cure that at any time by paying the fine and costs.

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As to the warrant not negativing the exceptions under the section of the Act upon which he was convicted, that may also be amended under 40 Vict. c. 18, s. 23; but if the conviction is amended as before mentioned, the warrant by 33 Vict. c. 27, s. 2, D., is not to "be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

I have now answered the whole of the objections, and the result is, that the application to discharge the defendant from custody must be discharged.

ONTARIO HIGH COURT OF JUSTICE— QUEEN'S BENCH DIVISION.

1882
Oct. 22.

REGINA *v.* BENNETT.

[*Reported 1 Ontario Reports, 445.*]

Justices of Peace, power to appoint—B. N. A. Act, s. 92, sub-s. 14.

The right of the Provincial Legislatures to legislate in relation to the administration of justice includes a right to make provision for the appointment of Police Magistrates and Justices of the Peace, by the Lieutenant-Governor. (1)

The defendant, Robert Bennett, was convicted before William Hixon Young, Police Magistrate, at Milton, on the 20th July, 1882, for having at the village of Georgetown, between the 1st May and 16th June, to wit, on 16th June last past, unlawfully sold intoxicating liquor, contrary to the provisions of the Canada Temperance Act, 1878; and he was adjudged to pay the sum of $50 and $6.65 costs, to be levied by distress and sale of goods and chattels, and in default of sufficient distress to be imprisoned in the common gaol of the county for the space of two months at hard labour.

The information on which the conviction was based, as far as material, was as follows: "That he (the informant) hath just cause to suspect and believe, and doth suspect and believe that Robert Bennett . . . within the space of thirty days last past to wit, on* or about the 15th and 16th days of June last past, at the village of Georgetown, in the County of Halton, did keep, sell, trade, and otherwise unlawfully dispose of intoxicating liquors, con-

(1) [See Regina *v.* Horner, *ante*, p. 317.]

trary to the form of the statute in such case made and provided." After the evidence had all been given and exception had been taken to the information on the ground that it contained more than one charge or offence, and that the time of committing the same was not stated with sufficient clearness, the magistrate reserved his decision until the 20th July, 1882, when he amended the information, without the informant having been re-sworn, so as to read as follows, after the asterisk (*) in the information, as above stated: "The 16th day of June, in the year of our Lord one thousand eight hundred and eighty-two, at the Village of Georgetown, in the County of Halton, aforesaid, did unlawfully sell intoxicating liquor, contrary to the form of the Canada Temperance Act, 1878, in such case made and provided."

The conviction, depositions, and information were returned into this Court under a writ of *certiorari*, and on notice of motion the Court was, on the 19th day of September, moved on behalf of the defendant Bennett to quash the conviction, on nine grounds of which the eighth was as follows:—

8. The convicting magistrate was not a duly authorized magistrate, because the Government of Ontario, by whom he was appointed, had no power to appoint police magistrates; and in any event there was no power or authority to appoint a police magistrate for the County of Halton, for which the said convicting magistrate was appointed.

Mr. *McCarthy*, Q.C. (Mr. *Fullerton* with him), for the motion.

The Magistrate was not duly appointed. The appointment of magistrates is a prerogative of the Crown—*Jones* v. *Williams* (1),—and has not been delegated to the Provincial Legislatures. Sect. 65 of the B. N. A. Act has

(1) 3 B. & C. 762.

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reference to executive, not judicial officers. The Magistrate is not a Provincial Officer within the meaning of sub-s. 4, s. 92 of that Act, nor a part of the "constitution, maintenance, or organization of the Court" of sub-s. 14. And the power not having been delegated to the Lieutenant-Governor in Council, remains in the Governor-General. The *Queen* v. *Reno* (1), is clearly distinguishable. In that case the Police Magistrate was appointed by the Governor-General, under 28 Vict. c. 20, and the Ontario Act 31 Vict. c. 17 merely continued that Act in force, as was competent, as it related to the administration of justice. The Magistrate remained in power by force of his previous appointment. The question is the same as that considered in *Lenoir* v. *Ritchie* (2), as to the right to appoint Queen's Counsel.

Mr. *Irving*, Q.C., contra.

In order to question the appointment of the Police Magistrate, the defendant has produced the Order in Council, shewing his appointment by the Lieutenant-Governor, which appointment was made in pursuance of R. S. O., c. 72, and the 41 Vict. c. 4, O. These statutes are *intra vires* of the Legislature of Ontario. The magistracy were appointed by provincial authority under statutes passed by the Province of Upper Canada, afterwards in the former Province of Canada. Police magistrates were appointed under powers contained in the statute, introducing municipal institutions. See 12 Vict. c. 71, s. 7. These powers having been exercised by provincial authority, in pursuance of statutes in that behalf, at the time of confederation, would fall within the distribution of powers made by the B. N. A. Act—see *Slavin* v. *Orillia* (3), and having been exercised in that part of

(1) 4 Pr. Rep. Ont., 281; *ante*, vol. 1, p. 810.
(2) 3 Can. S. C. R. 575; *ante*, vol. 1, p. 488.
(3) 36 U. C. Q. B. 159, 175; *ante*, vol. 1, p. 688.

Canada, now Ontario, become part of the powers of the Legislature of Ontario, falling under sections 65 and 92, sub-sections 4, 8, and 14. See also *Queen* v. *Reno* (1).

The power of the Lieutenant-Governor of Ontario to appoint the magistracy rests upon different grounds from that which the Supreme Court question in the case of Queen's Counsel appointed in Nova Scotia, in *Lenoir* v. *Ritchie* (2). There it was said that as the Crown had never by Act of the Provincial Parliament detached from the prerogative of the Crown the appointment by the Lieutenant-Governor of Nova Scotia of Queen's Counsel, such appointment still remained as part of the prerogative of the Crown, exerciseable by the Governor-General of Canada only. But in the case now under consideration the Parliament of the Province of Upper Canada, and afterwards of the Province of Canada, having legislated on the subject of the magistracy, so as to detach the appointment of Justices of the Peace from the Crown, as matter of prerogative, in favour of the Lieutenant-Governor, or Governor of the said Province, respectively, the power of their appointment falls under the powers of the Province of Ontario, by virtue of the sections of the B. N. A. Act before mentioned.

CAMERON, J.:—

The above nine objections may be conveniently arranged under the following heads, or questions:

1. Is the information defective and invalid so as not to support a conviction?

2. If so, had the magistrate power to cure the defect by allowing the amendment that was made; and if he had the power at all, had he power to make it after the evidence had been all taken, without reswearing the informant and hearing the charge in the amended form?

(1) 4 Pr. Rep. 281; *ante*, vol. 1, p. 810.
(2) 3 Can. Sup. C. R. 575; *ante*, vol. 1, p. 488.

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3. Is the conviction bad for want of certainty, preciseness, or particularity in the statement of the offence?

4. Was there evidence of the charge sufficient to make out a *prima facie* case to be considered by the Magistrate; and if so, was it rebutted so as to leave no conflict of evidence on which he could exercise his judgment?

5. Was the Magistrate qualified to act, or, in other words, was he a magistrate at all?

[The learned Judge, after discussing the first four of the above questions, as to the fifth, continued as follows, p. 458:]

The only remaining question is, the status of the Police Magistrate. This involves the important constitutional question, in which Government and Legislature rests the power of appointing or making laws for the appointment of Police Magistrates and other Justices of the Peace.

The first Act of the Legislature respecting the appointment of Justices of the Peace since the creation of the new constitution of the Dominion and Provinces under the B. N. A. Act, 1867, was passed at the first session of the Local Legislature, on the 4th March, 1868. I was then a member for the Executive Council of this Province, which was responsible for the introduction of the bill that afterwards passed into an Act of the Legislature. The B. N. A. Act made no express provision on the subject of the appointment of Justices of the Peace, or any officer connected with the administration of justice inferior or subordinate to the Judges of the Superior and County Courts. From the increase in the population in the old, and the settlement of new portions of the country, it was necessary that provision should be made for the appointment of Justices of the Peace, as it was conceived that without legislation there was no power of appointment resting in the Lieutenant-Governor or in the Governor-General. From the absence of express provi-

sion in the B. N. A. Act, and the vesting in the Local Legislature of the Province the exclusive power to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, it was conceived the power to pass such a law must rest exclusively with the Local Legislature. The view that the Executive Council as a whole, or any individual member of it entertained, leading to the introduction of the enactment, is of no consequence if the Act is in fact *ultra vires*, and I merely refer to that view as indicating the question now raised was present to the mind of the framers of the Act, and it is only reasonable to assume it was present to the Governor-General of the Dominion when the Act was communicated to him, and not disallowed under the power of disallowance vested in him under section 90 of the B. N. A. Act.

I assume there is no doubt that the appointment of Justices of the Peace was by prerogative in the Crown; but the Legislature of Upper Canada and the Parliament of the Province of Canada have assumed, without the power so to do having heretofore been questioned, to legislate in reference to their jurisdiction and qualification.

By the 1st Vict. c. 11, s. 7, the Legislature of Upper Canada gave jurisdiction to Justices appointed in and for one county in other counties for the special purposes of the Act, and thereby virtually appointed Justices of the Peace in counties to which their commissions did not extend. By 6 Vict. c. 3, s. 1, it was provided that all Justices of the Peace should be of the most sufficient persons dwelling in the district or counties, and no one should be a Justice not possessed of a certain property qualification, whereby the prerogative of the Crown was limited in the choice of Justices of the Peace; and by

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sect. 1 of c. 101, Con. Stat. C., power was given to the Governor-General in Council to appoint Justices of the Peace for remote parts of the Province not included within the limits of any district or county.

It is thus manifest that the legislation that is now complained of, as not being within the proper competency of the Legislature of Ontario, was not originated since Confederation with the latter Legislature.

In *Lenoir* v. *Ritchie* (1), it was held by a majority of the Judges of the Supreme Court, that it was not competent to the Legislature of the Province of Nova Scotia to pass an Act to authorize the Lieutenant-Governor to appoint Queen's Counsel, giving to such counsel precedence over Queen's Counsel previously appointed by the Governor-General, or precedence at all over such counsel; and this case was relied upon in support of the contention presented on behalf of the defendant in the present case, that the Legislature of this Province had not power to pass the 9th section of the Act, 41 Vict. c. 4, authorizing the Lieutenant-Governor in Council to appoint a Police Magistrate for a county, and that the appointment of Mr. Young as Police Magistrate in and for the County of Halton was invalid, and consequently the conviction made by him of the defendant was totally void. But the cases are distinguishable.

The status of Queen's Counsel is one of mere honour and dignity, and not necessarily connected with the administration of justice. Their creation therefore is not in terms by the B. N. A. Act assigned to the Local Government or Legislature, but pertains to the prerogative of Her Majesty since as it did before Confederation.

In *Chitty* on Prerogatives, it is stated at p. 118: "To the Crown belongs the prerogative of raising practitioners in the Courts of justice to a superior eminence by

(1) 3 Can. S. C. R. 575; *ante*, vol. 1, p. 488.

constituting them serjeants, etc., or by granting letters patent of precedence to such barristers as His Majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and preaudience as are assigned in their respective patents."

The office of Police Magistrate is the simple creation of an Act of the Legislature, and in creating the office it had, when not in conflict with the express or implied powers of such Legislature, or in excess thereof, the right to determine how the appointment should be made. The power of appointment under the Act in question is given to the Lieutenant-Governor in Council, as the power was given under cap. 101 of Con. Stat. C., to the Governor-General in Council, to appoint magistrates or justices of the peace under that Act. In the judgment of Mr. Justice Taschereau, the distinction between the Governor-General acting solely as the representative of Her Majesty and the Governor-General in Council is pointed out.

In reference to the disallowance of Acts passed by the Local Legislatures, he says at page 624: "The power of veto is given to the Governor-General in Council, not to the Governor-General himself. And it cannot be contended that the Governor-General in Council is the Queen or the representative of the Queen, or that the Governor-General in Council exercises the prerogatives of the Queen, or can give, directly or indirectly, to any person or public body the right to exercise such prerogatives. (Of course, I speak here only of the power to grant dignities and honours.) The Governor-General, alone, exercises the prerogatives of the Queen in her name in all the cases in which such prerogatives can be exercised in the Dominion by any one else than Her Majesty herself."

Of course, the learned Judge is treating the Governor-General in Council as acting upon the advice of the

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Council, the members of which are responsible under our Constitution to Parliament for their advice as shewn by the action following, or the result of such advice: while in the exercise of pure matters of prerogative, as distinguished from acts indicating or carrying into effect the policy of the Government, he acts of his own mere motion, independently of or even against the advice of the Privy Council, if he has chosen to consult them upon the subject. The learned Judge, too, in using the language I have quoted, was doing it for the purpose of shewing that the fact of an Act of the Local Legislature not having been disallowed by the Governor in Council could not be taken as an indication that Her Majesty had thereby impliedly consented to any curtailment or transfer of the right of exercise of the royal prerogative, that such Act might work, and in that view does not support the contention that an interference with the prerogative, in respect of the appointment of justices of the peace by former legislation, which had not actually received Her Majesty's sanction, could be accepted as an indication of Her Majesty's concurrence in such legislation, so as to render valid an appointment made thereunder by an authority not having the power or right in the special case to use the royal prerogative.

But, in my opinion, justices of the peace are part of the system of the administration of justice in the Province, and therefore under sub-section 14 of section 92 of the B. N. A. Act the right to legislate as to their appointment is expressly conferred upon the Legislature of the Province; and therefore Mr. Young was duly appointed Police Magistrate for the County of Halton.

This view is supported by the provision contained in section 96, giving the appointment of Judges of the Superior, District, and County Courts to the Governor-General, and no provision being made for the appoint-

ment of any subordinate officer or authority in connection with the administration; indicating that the intention of the Imperial Parliament, under the assignment of the power to make laws relating to the administration of justice to the Local Legislature, was to give such Legislature full power to legislate as to the appointment of all officers connected with the administration, except the Judges in respect to whose appointment the appointing power was expressly indicated.

The same question was raised in the Supreme Court of Nova Scotia, in the case of *Gardner* v. *Parr* (1), but was not decided, or, at least, in the reasons for the decision given the Court did not refer to the question of the legislative power, and dismissed the appeal on the merits. The case does not, therefore, afford any assistance in the present case.

The conviction is not open to the objections alleged against it, except those relating to the insufficiency of the evidence to establish that the offence charged was an offence at all within the County of Halton; or, if an offence, that there had been any reasonable evidence before the magistrate to sustain it. On these latter grounds it must be quashed.

Conviction quashed.

(1) 2 R. & G. 225.

ONTARIO HIGH COURT OF JUSTICE— QUEEN'S BENCH DIVISION.

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Nov. 25;
Dec. 2.

REGINA *v.* O' ROURKE.

[*Reported 1 Ontario Reports, 464.*]

Criminal law—Selection of jurors—32-33 Vict. c. 29, s. 44, D.

By a Dominion Statute "for avoiding doubt" it was declared and enacted "that every person qualified and summoned as a Grand Juror or a Petit Juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such Juror, in that Province, whether such were laws passed before or be passed after the coming into force of the B. N. A. Act, 1867—subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act," Acts were afterwards passed by the Ontario Legislature changing the mode of selecting jurors in that Province:

Held, that the Dominion enactment was not an unconstitutional delegation of legislative authority and was not *ultra vires*, and that a selection of jurors made in the manner prescribed by the Ontario Acts was valid for the purpose of a criminal trial.

The prisoner was indicted for murder, and pleaded not guilty, and at the trial before Cameron, J, at Milton and upon the empanelling of a jury for his trial, he challenged the array of the said panel, because he said, the array of the said panel was arrayed and returned by George Crawford McKindsey, then and at the time of the making of the said array sheriff of the County of Halton; and because said panel was, though duly selected from certain persons in the county, designated by and selected

*Present:— HAGARTY, C. J., and ARMOUR and CAMERON, JJ.

in accordance with the provisions of the Revised Statutes of the Province of Ontario, and the said statutes were *ultra vires* and void, to wit, c. 48 Revised Statutes of Ontario, and other statutes of Ontario amending the same, to wit, 42 Vict. c. 14; 44 Vict. c. 6; and that said panel was not selected in accordance with any section of any statute of the Dominion of Canada, which the Parliament of the Dominion of Canada had power to pass; and because the selection and choosing of jurors in criminal cases was part and parcel of the procedure in criminal cases and the Parliament of the Dominion of Canada alone had jurisdiction in matters of procedure in criminal cases under the provisions of the British North America Act; and the said Parliament of Canada had no authority to delegate the powers which it had to legislate in regard to procedure in criminal cases to the Provincial Legislature of any Province, or to any other body whatsoever: wherefore the prisoner said that the above-mentioned statutes of the Province of Ontario, and s. 44 of c. 29 of 32-33 Vict. D., were *ultra vires* and void, and that said panel was improperly selected and chosen and that the said prisoner had not a jury empanelled from the body of the county on which he could put himself upon his trial, as by law he was entitled to have; and the prisoner further said that the said panel was not selected by the selectors chosen by law, in this, that John Dewar, Esq., Clerk of the Peace of the said County of Halton, was not one of the selectors on the second selection when the jury list, from which the said panel was taken was made up, as by law he should have been; and in this, that in the first selection of jurors from the different townships in said county only certain persons, whose names commenced with certain letters, were chosen, or could have been chosen, under the said statute; whereas other persons whose names commenced with other letters, lived

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in said townships, and were liable to be selected, and could have been chosen as jurors; all the said proceedings having been taken and had under the laws and statutes of the Province of Ontario.

To this challenge the Crown demurred, and the prisoner joined in the demurrer, and thereupon the Court adjudged and determined that the said challenge of the prisoner to the array of the said panel was not sufficient in law to quash the array of the said panel, and it was adjudged and ordered that the said array of the said panel should be affirmed.

The said panel was thereupon duly sworn, and having duly tried the said prisoner, duly found him guilty of the felony of which he was indicted, and the prisoner was thereupon sentenced to death; and the said learned Judge thereupon reserved the question of the validity of the said challenge for the consideration of the Justices of the Common Pleas Division of the High Court of Justice, under Con. Stat. U. C. s. 112, who, after consideration thereof, held that the validity of the said challenge was not a matter that could be reserved under that Act (1). The prisoner thereupon applied for and obtained a writ of error upon the fiat of the Attorney-General, which said writ was issued from the office of the Registrar of the Queen's Bench Division of the High Court of Justice, and was addressed "To our Justices of Oyer and Terminer for our County of Halton assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, trespasses and other evil doings within the said county."

Under the said writ the prisoner assigned the following matters for error: that the indictment and the record and the matter therein contained were not sufficient in law to warrant the judgment against him or to convict him of

(1) [See the judgment of the Common Pleas Division, *post*, p. 659].

the said felony and murder: that the jurors composing the panel summoned at the sittings of the High Court for the trial of civil and criminal cases held at Milton, in the said County of Halton, at which the said prisoner was tried and convicted, were selected and chosen under the Revised Statutes of Ontario c. 48, c. 14 of 42 Vict, and c. 6 of 44 Vict., and were selected from persons in the several municipalities forming the County of Halton whose names began with a peculiar letter of the alphabet, determined upon for the respective municipalities by the county selectors, as provided for by sub-section 3 of section 11 of the said Act, 42 Vict. c. 14; and that John Dewar, Esq., Clerk of the Peace, was not present at or acting as a selector of the persons to compose the jurors for the said county, as he should have been under sect. 5 of the Statutes of the Province of Canada, c. 44, 26 Vict., and c. 31 of the Con. Stat. U. C. sect. 51, nor could he be allowed to be present and act as a selector under the said Statutes of Ontario; that the selection so made, not being from the body of the county, nor in accordance with the law before the B. N. A. Act came into force, nor with any Act of the Parliament of the Dominion of Canada passed since, which the said Dominion Parliament had power to pass, was invalid, and the Acts of the Parliament of the Province of Ontario, in so far as they related to the selection of jurors for the trial of criminal cases were *ultra vires* and void, and the Act of the Parliament of Canada, 32-33 Vict. c. 29, in so far as it related to and made qualified as jurors persons qualified and summoned as grand and petit jurors in criminal cases, according to the laws which might be then in force in any Province of Canada, whether such were laws passed before or should be passed after the coming into force of the B. N. A. Act 1867, that is to say, sect. 44 of the said Act, was *ultra vires*, as delegating to

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the Local Legislatures a matter of criminal procedure, which by the said B. N. A. Act belonged to, and must have been determined by, the Parliament of the Dominion.

Upon these matters of error so assigned issue was joined.

Mr. *N. Murphy*, for the prisoner.

The Dominion Legislature and the Local Legislatures possess only the powers conferred on them by the B. N. A. Act. By sect. 91 of that Act the Dominion Legislature has exclusive authority over all matters coming within the classes of subjects enumerated in the sub-sections of that section. By sub-sect. 27 the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters, is assigned exclusively to the Dominion Parliament. Section 92, sub-sect. 14, confirms this. Is the selection of jurors a matter of procedure or of the constitution of the Courts? The old writ of *venire facias*, by which juries are summoned, is called a process for summoning a jury. In *Chitty's* Criminal Law process is defined to be the name of proceedings to summon juries, witnesses, and the like. See also 3 Blackstone's Com. 279; 4 Blackstone's Com. 350. The Criminal Procedure Act, 32-33 Vict. c. 29, D., deals with the right of challenge a prisoner may exercise, and in a capital case like this allows him twenty peremptory challenges. Is not this a matter of the selection of a jury? If so, is not the selection *ab initio ad finem* a matter of procedure? If not, where is the line to be drawn—where constitution ceases and procedure commences? The Local Legislature could not say that the prisoner could only challenge six persons peremptorily, or that six jurors only should be empanelled in Criminal cases.

Under the B. N. A. Act the appointment of Judges rests with the Dominion Government. Jurors are judges of

the facts. The Dominion Legislature could not delegate its powers so as to empower the Local Government to appoint Judges. The selection and number of grand jurors seem to be conceded as a matter of criminal procedure; for although the Local Legislature by c. 13 of 42 Vict. limited the number of grand jurors to fifteen, the proclamation of the Lieutenant-Governor necessary to call the Act into force was never issued.

Should the selection of jurors be a matter of procedure, as by the judgment of Wilson, C. J., in *Reg.* v *O'Rourke* (1) it appears to be, the first question is, had the Dominion Legislature power to pass sect. 44 of c. 29, 32-33 Vict. ? And the second question is, are the Acts of the Local Legislature inconsistent with the laws of the Dominion ?

The B. N. A. Act being the source from which all powers that can be exercised either by the Dominion or Local Legislatures are derived, and that Act not having given to any of the Legislatures any authority to delegate their powers, all powers conferred upon them by that Act should be exclusively exercised by those upon whom they are conferred. The Dominion Legislature cannot confer any powers upon the Local Legislature, nor can they, by a delegation, shirk the responsibilities which are cast upon them by the B. N. A. Act. It was more than suggested in the judgment in *Reg.* v. *O'Rourke* (1) that sect. 44 c. 29, did not delegate powers, but adopted laws passed, or to be passed, by the Local Legislatures. An adoption must be of a thing *in esse*: there can be no adoption of anything *in futuro*. On this section the remarks made by Taschereau, vol. 2, page 229, seem to apply very forcibly. Should the Court be of opinion that this section is *ultra vires*, they should not hesitate to declare it so: *Dwarris* on Statutes (1873), 429, 430,

(1) 32 U. C. C. P. 388; *post* p. 659.

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431, 432, 433, 434, 437, 438, 441, 442. As to the rule of interpretation of Statutes, see *Dwarris*, 122, rules 4 and 9; also *Dwarris*, 128, and *Vattel*, rules 16, 23, 30. Should the Dominion Parliament have power to delegate their authority to the Local Legislature, or should they have the power to adopt the laws of the Local Legislature, as to the selection of jurors, those laws of the Local Legislature would be inconsistent with the laws of the Dominion, and under sect. 44, above cited, would be invalid and of no force. Before the Local Legislature changed the jury law, the selection of jurors was governed by Con. Stat. U. C. c. 31, and under sect. 51 of that Act the Clerk of the Peace was *ex officio* one of the selectors. This Act was amended, but not materially, by 26 Vict. c. 44. Chapter 48, R. S. Ont. s. 46, leaves out the Clerk of the Peace, as one of the selectors, and is consequently inconsistent with c. 31, Con. Stat. U. C. By 42 Vict. c. 14 O., a letter or letters are given to each municipality, by which they shall choose the jurors to be selected from that municipality; and by sect. 13 of that Act, which repeals R. S. O. c. 48, s. 20, balloting is introduced, all which provisions are inconsistent with and contrary to c. 31, Con. Stat. U. C. sect. 53, sub-sects. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, and sect 55. In *Reg.* v. *O'Rourke* (1), it was said that it was the duty of the Court to support sect. 14 of 32-33 Vict. c. 29, if the Court could possibly do so. It had long been acted upon, and without dispute or question, and it had occasioned, and could occasion, no injustice in point of fact. The rule as to the construction of criminal statutes is, that they should be construed *in favorem vitæ*, and no grounds of public policy are weighty enough to override that rule of construction.

Mr. *Irving*, Q. C. contra.

The deviations from the system of balloting alleged

(1) 32 U. C. C. P. 388; *post*, p. 659.

to be errors, are the matters which by the statute are directory only, and not imperative. Such matters as are alleged to be deviations from the law in force at the time of Confederation, and which have been under the Ontario Act, and admittedly in accordance therewith, are such as are within the powers of the Court to order otherwise. See Con. Stat. U. C. c. 31, s. 63, and the judgment of Blackburne, C. J., in *Fogarty* v. *Reg.* (1), commenting upon the like section in 3 & 4 Wm. IV. c. 91, sec. 15, of the Irish Jury Act; also *Reg.* v. *Conrahy* (2). The absence of the Clerk of the Peace as one of the county selectors required by 42 Vict. c. 14, s. 3, O., is not error, because the county selectors are such as conform to the 26 Vict. c. 44, s, 5, prior to Confederation. But none of the errors assigned can be maintained in the face of the Con. Stat. U. C. c. 31, s 139, carried into the Revised Statutes of Ontario, page 571 ; unless in the case of fraud that section must prevail.

The Parliament of Canada by sect. 44 of the Procedure Act 32–33 Vict. c, 29, have rightfully adopted the jury laws of the Provinces. If the matters in question by way of error are such as are within the powers of the Dominion Parliament, and not of the Provincial Legislature, then the Dominion Parliament has power to confer legislative powers upon the Provincial Legislatures: *Reg.* v. *Hodge* (3) ; *Reg.* v. *O'Rourke* (4); *Reg.* v. *Burah* (5).

The argument of the plaintiff in error, that sect. 44 being subject to "any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act," means subject to laws of the old Province of Canada, cannot prevail, because the legislation in the 44th section applied to other Provinces than those forming part of the former Province of Canada,

(1) 10 Ir. L. R. 58, 61. (2) 1 Craw. & Dix, 56. (3) 7 App. Rep. 246.
(4) 32 U. C. C. P. 388 ; *post*, p. 659. (5) 3 App. Cas. 889.

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and was for the whole Dominion; and if to be considered at all, then sect. 139 of the Con. Stat. U. C. c. 31, s. 39, an enactment of the former Province of Canada, and before cited, would be fatal to the view taken by the plaintiff in error in the construction of sect. 44.

The selection and summoning of jurors to meet the Courts of Oyer and Terminer, is part of the constitution, organization, and maintenance of the Court, and is not part of criminal procedure. Although commissions are not now ordinarily issued, the constitution of the Court for the trial of offences is to be found by examination of the form of such commission. See *Whelan* v. *Reg.* (1) and per Richards, C. J., p. 81; and the Court cannot proceed to the trial of offenders without a jury being in attendance; and it is the commission which causes the sheriff to act under precept of the commissioners. It is no part of criminal procedure the bringing together of the jurors in the organization of the Court.

It has been decided that the state of things existing in the Confederated Provinces at the time of Confederation and more particularly that which was recognised by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act, 1867: *Corporation of Three Rivers* v. *Sulte* (2); *In re Slavin and the Corporation of Orillia* (3), per Richards, C. J. Thus, in the former Province of Canada, the constitution of the Courts of criminal law, and the jury system in connection with said Courts, are enacted separately as affecting Upper and Lower Canada, while criminal procedure was made by a general Act applicable to the whole of the former Province of Canada. The other Provinces in the same way. See *Forsyth's*

(1) 28 U. C. Q. B. 2. (2) 5 Legal News, 330, 333; *ante*, p. 230.
(3) 36 U. C. Q. B. 159, 165; *ante*, vol. 1, p. 668.

Cons. Opinions, 169 ; *Reg.* v. *Foley* (1). See also *Dalton's* Justice, c. 193, p. 529 ; *Brown's* Law Dictionary, 152 ; *Niagara Election Case* (2), per Gwynne, J.; *Burton's Case* (3), per Scott, J. ; *Thompson & Merriam* on Juries, sect. 149 ; *O'Connell* v. *Reg.* (4), per Lord Brougham, as to the question of the selection of the jury going to the jurisdiction of the Court.

HAGARTY, C. J. :—

The questions argued before us on the assignment of errors may be shortly stated.

The prisoner was convicted at the Halton Assizes.

The jurors on the panels of the grand and petit juries were selected and summoned under the statute of Ontario 42 Vict. c. 14, which came into force on the 1st May, 1879.

It is fully conceded by Mr. *Murphy* that if this Act be in force, his objections must fall to the ground.

It is, therefore, to its validity we have solely to direct our attention.

It professes to amend and to repeal in part chapter 48 of the Revised Statutes of Ontario, and alters in some particular the manner of selection.

The Revised Statute is, with some slight variations, a reprint of the Consolidated Statutes of Upper Canada, c. 31, which was the Act in force (in substance) at the date of the confederation of the Provinces.

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(1) REGINA v. FOLEY.

"The Acts relating to the attendance of grand and petit jurors at the County Courts" (Courts of criminal jurisdiction over all crimes which are not capital) "are within the powers of the Local Legislature, under the B. N. A. Act, 1867, section 92, as pertaining to the 'Administration of Justice' and the 'Constitution and Organization of Provincial Courts,' and do not belong to the Parliament of Canada, under section 91, as 'Procedure in Criminal matters.'"

[The note of *Regina* v. *Foley* here given is from Stevens' New Brunswick Digest, 2nd ed. 381. The judgment was by the Supreme Court of New Brunswick in Easter Term, 1873, and is not reported.]

(2) 29 U. C. C. P. 280.

(3) 4 *Leigh's* Rep. (Virginia), 645, 646.

(4) 11 Cl. & F. 155, 347.

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Section 129, B. N. A. Act, provides that all laws in force in Canada, Nova Scotia, and New Brunswick, at the Union, and all Courts of Civil and Criminal jurisdiction, and all legal commissioners, etc., and all officers, judicial and administrative, etc., shall continue in Ontario and Quebec, and, as if the Union had not been made, etc., subject to be repealed, altered, etc., by the Parliament of Canada or the Provincial Legislature, etc.

The Criminal Procedure Act, 32-33 Vict. c. 29, declares that divers Acts had been passed assimilating, amending and consolidating certain provisions of the statute law of the several Provinces, and extending them to all Canada, and that it was expedient to assimilate, etc., the provisions of the statute law respecting procedure and other matters not included in said Acts.

Provisions are made as to challenges of jurors, both for the prisoner and for the crown, and for juries *de medietate linguæ*, and when by challenge or otherwise the panel has been exhausted, for the summoning of fresh jurors by the sheriff, whether on the jurors' roll or otherwise qualified or not, and for such jurors, whether otherwise qualified or not, being added to the panel, etc., and saving all authorities of the Court or Judge, or any practice or form in regard to trials by jury, jury process, juries or jurors, unless where altered by this Act.

Section 44 says, "And for avoiding doubt it is declared and enacted that every person qualified and summoned as a grand juror or as a petit juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before or be passed after the coming into force of the B. N. A. Act, 1867—subject always to any provision in any Act of the Parliament of Canada,

and in so far as such laws are not inconsistent with any such Act."

Section 79 declares that "judgment, after verdict upon an indictment for any felony or misdemeanour, shall not be stayed or reversed . . . by reason that the jury process has been awarded to a wrong officer, . . . nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who was not returned as a juror by the sheriff or other officer."

In the interpretation clause, sec. 1, sub-s. 6, it is declared that "the expression, 'any Act' or 'any other Act,' when it occurs in this Act, . . . shall include any Act passed or to be passed by the Parliament of Canada, or any Act passed by the Legislature of the late Province of Canada, or passed or to be passed by the Legislature of any Province of Canada . . . unless there be something in the subject or context inconsistent with such construction.

The Dominion Parliament, in this Act, seems to me clearly to assert its right to deal with the qualifications and selections of jurors as matters within its cognizance, and as pertaining to criminal procedure applicable to all the Provinces.

The prisoner's counsel is necessarily forced to argue that such matters pertain exclusively to the Dominion Parliament, as procedure, because, to uphold the jurisdiction of the Local Legislature in the premises as of their own authority, is confessedly fatal to his client, the proceedings being in accordance with the local enactment.

It seems to me to be very clear that the Dominion Parliament, by this Act of 1869, adopted and as it were confirmed the existing Provincial jury laws, and also declared that future Provincial laws on that subject should be equally adopted and confirmed, subject, however, to

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their own right of control by any existing or future Act.

This need not be read as technically a delegation of their own authority, but rather, in the language of Wilson, C. J., an acceptance of the Provincial law, and a legislation by relation and reference to that law.

But if it were directly a delegation of power, I am not prepared to hold it erroneous.

The Dominion Parliament is supreme in criminal law and procedure, and may, I assume, exercise its powers in such fashion as it may deem expedient.

The only question with me is, whether it has clearly sanctioned and adopted the statute law of Ontario, under which the jurors were brought into Court in this case.

I think this has been done, and that the Ontario Act must govern so long as the Dominion Parliament has not interposed or enacted any provision inconsistent therewith.

This, it is conceded, has not been done.

This 44th sect. means that whatever law of the Province may be *then* in force, that is, whenever the question may be raised, shall govern.

It must not be considered that we are doing more than expressing our judgment on the validity of the objections taken to this conviction.

Mr. *Irving* for the Crown, expressly waives all objections to the method of obtaining such judgment.

The Court of Common Pleas, in its judgment in this case, while declining to accept it as properly before them as a case reserved, has given its opinion on the merits adverse to the prisoner.

We, of course, do not overlook the existence of section 139 in the Con. Stat. U. C. c. 31.

"No omission to observe the directions in this Act contained, or any of them, as respects the qualification, selection, balloting, and distribution of jurors, the pre-

paration of the jurors' book, the selecting jury lists from the jurors' rolls, the drafting panels from the jury lists, or the striking of special juries, shall be a ground of impeaching the verdict in any cause, or be allowed for error upon any writ of error or appeal to be brought upon any judgment rendered in any case, criminal or civil, by any Court in Upper Canada."

This clause is adopted in the Act in the R. S. O. c. 48, s. 133, confining it to civil cases in Ontario.

Where no "unindifference" of the sheriff or fraudulent dealing is suggested it would seem as if most, if not all of any possible irregularities are thus declared as not to be assignable for error.

On the merits of the objections, apart from the form in which they are presented, we have the advantage of the opinion of the Court of Common Pleas (1).

I am satisfied that judgment must be given for the Crown.

[The judgment of Mr. Justice Armour did not discuss the constitutional question.]

CAMERON, J.:—

At the trial of the prisoner I gave the following judgment:—

"I overrule the objections on the ground that they are not causes of challenge to the array. Some of the jurors would be qualified, under any circumstances, as being of the body of the county, and errors or defects in the method of selection do not constitute a ground of challenge to the array. But were it otherwise, I think sect. 44 of 32-33 Vict., Dom. Acts, removes all difficulty. Although to a certain extent it may be said there is a delegation of authority to the Local Legislature in determining who shall be qualified to serve as jurors, it is not

(1) See *post*, p. 659.

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a direct authority to the Local Legislature, but is simply a legislative declaration on the part of the Dominion Parliament, that what the Local Legislature, has done or may do will determine the qualification of a juror in criminal cases. This is a different thing from giving express power to the Local Legislature to fix the qualification of, and manner in which, a juror may be chosen. The distinction may be fine, but it appears to me to exist. I therefore overrule the challenge to the array, and direct judgment for the Crown to be entered on the demurrer to such challenge."

I have, after hearing the very full and able arguments on the errors assigned, found no reason to change the conclusion I arrived at on the trial, but further consideration of the question confirms me in the opinion I then formed upon both points.

With reference to the question of delegation of the functions of the Dominion Parliament to the Local Legislature, I will only add if the judgment of the Court of Appeal in the *Queen* v. *Hodge* (1), overruling the judgment of this Court, be good law, the power of delegation exists. For if a Legislature, which has a more limited jurisdiction than the Parliament of Canada, can, though its own powers of imposing punishment are expressly stated to be "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects" over which the Legislature has jurisdiction, delegate the power of creating an offence, and fixing or determining the punishment for its commission, though such offence be not an offence against any law of the Province, but against a by-law of a body with restricted local jurisdiction, *a fortiori* can the Parliament of the Dominion which is not restricted

(1) 7 App. Rep. 246. [This case is now before the Privy Council.]

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in any way whatever as to the exercise of its powers over matters within its jurisdiction—in other words, over all matters not expressly placed within the exclusive powers of the Local Legislatures. I wish also to be understood as not holding the opinion that, where a question like the present has been reserved by a Judge at the trial, it may be the subject of a writ of error.

Judgment for the Crown.

[The part of the judgment of the Common Pleas Division which has reference to the merits of the question involved in the present case is as follows, 32 U. C. C. P., p. 400.]

WILSON, C. J.:—

As to what may be called the merits of the proceeding before us, there is only one question really to be determined upon the case reserved, and that is whether sect. 44 of the Dominion Act 32 & 33 Vict. c. 29 is a valid enactment?

The jurors for this Province, at the time of Confederation, were selected under the 26 Vict. c. 44, s. 5. No change was made in that mode of selection until the passing of the Ontario Act 42 Vict. c. 14, ss. 3 and 11, sub-ss. 3 and 4. The clerk of the peace was excluded by sect. 3 of the last named Act, while he was a selector by the 26 Vict. c. 44. That is one of the formal objections to the alterations of the Act. The other is, that by sect. 11, sub-ss. 3 and 4, the jurors are selected only from out of those qualified to serve whose surnames begin with certain alphabetical letters, in place of from the whole body of those who were competent to serve under the Jury Act of Ontario as it was before Confederation.

The prisoner's counsel contends that the Act which was in force at the time of Confederation was the C. S. U. C. c. 31, as amended by the 26 Vict. c. 44, s. 5, and as consolidated by the R. S. O. c. 48, and that the jurors should have been selected according to that last named Act, and not under the 42 Vict. c. 14, O.; and that the 32 & 33 Vict. c. 29, s. 44, D., was and is *ultra vires* and void. If it be so, the whole case for the Crown fails. If it be not, the case for the prisoner fails.

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I shall therefore consider that question, as it may be unnecessary to give any attention to the other minor and dependent objections.

The objection of the prisoner's counsel is, that the 32 & 33 Vict. c. 29, s. 44, D., which enacts "that every person qualified and summoned as a grand juror or a petit juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before or be passed after the coming into force of the B. N. A. Act, 1867—subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act," is a delegation by the Dominion Parliament to the Ontario Legislature of the power to enact jury laws for the Dominion Parliament.

It is our duty to support the enactment if we can possibly do so. It has long been acted upon, and without dispute or question, and it has occasioned and can occasion no injustice in point of fact. It is a purely legal question.

It was settled in the *Niagara Election Case* (1), that the Dominion Parliament could authorize the Ontario Superior Courts to try the Dominion Controverted Elections, because in effect it was constituting these Courts Dominion Courts for that purpose, and that the Dominion Parliament could also authorize the proceedings in these election cases to be carried on in the like manner as if they were taken in an ordinary cause within the jurisdiction of the Provincial Courts. I did not concur in that decision, but I have no doubt now it was well decided. The following are two instances of such kind of legislation out of many which could be selected in our own country.

The Dominion Act, 35 Vict. c. 14, s. 2, enacts that the voters' lists in Ontario for Dominion elections shall be the same as in elections for the Ontario Legislature; and by the R. S. O. c. 49, s. 48, it is provided that rules of Court made under the Act shall "be of the same force and effect as if the provisions contained therein had been expressly enacted by the Legislature." That is a case more of delegation, but the enactment in question is not of that nature.

There is no delegation by the Dominion Parliament of the power to enact jury laws for the Criminal Courts in Ontario. What is done is by a positive enactment of the Dominion, that a certain law

(1) 29 U. C. C. P. 361. [See also *Valin* v. *Langlois*, 5 App. Cas. 115: *ante*, vol. 1, p. 158.]

in force in Ontario, shall for the Dominion purposes be the law of the Dominion. It is a Dominion law enacted not in *extenso*, but by relation and reference to a law of Ontario.

If the Dominion Parliament, enacted that Dominion officers in Ontario should have the like tenure of office which the Provincial officers performing similar duties in the respective Provinces had, that legislation by relation and reference would not be a delegation of power, because the Provincial Legislature would have no choice in accepting or acting upon or rejecting the Dominion enactment, and they have no power to alter or repeal it, although they may defeat it or change it by altering their own legislation to which the other has relation.

A valid contract may be made by relation, as if one agree to sell the like goods and quantity of them at the like price he has sold them at, or may sell them at, to a named third person. So a conveyance in fee simple may be made by conveying the land to the grantee in like manner and for the like estate therein as the grantor has sold certain other land to a named third person, or by which such third person has and holds his land, without the important word *heirs*. And in like manner an agreement good by relation may be defeated by the act of one to whom or to whose condition the reference is made; as to pay an annuity to one so long as a third person shall remain unmarried, or shall retain a certain office or shall live in a particular house. Yet no one would say that there was any delegation of power by the grantor of the annuity to the person upon whose act the continuance of the annuity depended, because he by his own act could defeat the grant.

In not one of these cases is there the least grant of power. Nor do I think the Dominion has granted any such power to this Province. It is an enactment that while such a law exists in the Province the Dominion enactment shall have a certain operation in that Province; or it is a declaration that the Provincial law shall, while in force, be, and shall be accepted by the Dominion as its own law throughout the Province for its own purposes; and such enactment is valid and unobjectionable. The following case should remove all doubt upon this subject.

In *The Queen* v. *Burah* (1), the Council of the Governor-General of India in Council passed an Act in 1869, which authorized the Lieutenant-Govenor of Bengal to call it into operation by a *Gazette*

(1) 3 App. Cas. 889.

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notification on such day as he should appoint, and which provided that after such notification a certain other Act should be repealed. The Act also removed a certain territory from the jurisdiction of the Courts of civil and criminal judicature, and from the control of certain authorities. And it placed the administration of justice, etc., in the said territory in such officers as the Lieutenant-Governor might appoint. The Lieutenant-Governor was authorized from time to time, by notification in the Calcutta *Gazette*, to extend to the said territory any law then in force in the other territories subject to his government, or which might be enacted by the council of the Governor-General or of the Lieutenant-Governor; and from time to time by the like notification to extend, *mutatis mutandis*, all or any of the provisions in the other sections of the Act to certain other parts of British India. The Lieutenant-Governor by notification extended the provisions to a certain territory. The majority of the High Court in India decided the notification of the Lieutenant-Govenor had no legal force or effect in extending the Act to the territory in question and removing it from the jurisdiction it was formerly under, because the council of the Governor-General of India in Council had no power to delegate such authority to the Lieutenant-Governor. The Government of India, on behalf of the Crown, appealed to the Privy Council.

Lord Selborne, L. C., who gave the judgment of the Privy Council, said (p. 906): "It is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been, to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may . . . be well exercised either absolutely or conditionally. Legislation conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and in many circumstances it may be highly convenient. The British Statute Book abounds with examples of it."

It was argued also, for the prisoner, that the selection and summoning of jurors was a matter of procedure, and so within the jurisdiction of the Parliament; and by the Crown counsel, that it was not a matter of procedure, but was within the terms "constitution and organization" of Criminal Courts.

By the B. N. A. Act, sect. 91, number 27, "The criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters," is one of the powers which is vested in the Dominion Parliament.

And by sect. 92, number 14, "The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts," is one of the powers which is vested in the Provincial Legislature.

It will be observed that in both enactments the *constitution* of the Criminal Courts is put in opposition to the *procedure*.

Whether the Provincial Legislature has the power to establish a Criminal Court with jurisdiction to try all matters which come before it without a jury, may be a question. An enactment of that kind may be said to relate to the *constitution* and *organization* of the Court, and with great force also to relate to matter of procedure only.

The jury when empanelled and sworn form a part, and an essential part, of the constitution of the Court. They have the prisoner delivered in charge to them; they are to give their verdict of guilty or not guilty. There can be no trial without them, and they are the sole judges of fact, and they have and exercise functions quite independently of the Judge. All that is true, but it does not prove that the selection and summoning of juries are matters affecting the jurisdiction of the Courts, or relate to their constitution and organization.

Process is the name of the proceedings taken "to summons juries, witnesses, and the like;" 3 Bl. Com. 279; 4 Bl. Com. 350. The manner of procuring a jury was by precept or *venire facias* from the Judge or commissioner directed to the sheriff, and that writ is called *process* for summoning the jury: 1 *Chitty's* Criminal Law.

Process relates to the means of carrying on an action. *Procedure* relates to the act and also to the manner of carrying on the different styles or proceedings in the action.

These terms do not apply to the constitution or organization of Courts, and therefore the Dominion Parliament has the sole power

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over the mode of selecting and summoning of jurors for the trial of the prisoner. In *Blackamore's Case* (1), it is said: "*et processus derivatur a procedendo ab originali usque ad finem.*" See also Jacob's Law Dictionary: "Process."

I may say that the mode of selecting jurors by the initial letter of their surnames, although not the most usual course, cannot be illegal when the Legislature can dispense with a jury altogether, or can deal with the law relating to jurors in any way it pleases.

If such a course had been taken before the 42 Vict. c. 14, O., was passed, it would no doubt have been bad, but since then the method of selecting the jurors is the one expressly directed to be taken: *Birkett* v. *Crozier* (2).

Upon the whole I see no objection which is entitled to prevail against the trial and conviction of the prisoner, and we answer the question of the learned Judge by way of opinion, and not by way of judgment—that is, subject to our jurisdiction, as before stated—that the said challenge of the array was not for good cause, and should have been decided against the said Michael O'Rourke.

Our judgment, however, is, that the case reserved by the learned Judge could not in law be, and has not been by law properly reserved for our consideration, and that the said case reserved be quashed.

OSLER, J.:—

I agree that the question submitted by the case reserved is not one which could under the circumstances properly be reserved by the learned Judge at the trial.

I am also of opinion, for the reason stated in the judgment which has just been delivered, that the Dominion Act, 32 & 33 Vict. c. 29, s. 44, is not *ultra vires*, and therefore that the challenge of the array was not for good cause, and was rightly decided against the prisoner.

On the other questions discussed in the judgment, I desire to express no opinion at present.

GALT, J., concurred.

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(1) 8 Rep. 157 *b*.

(2) 3 C. & P. 63.

ONTARIO HIGH COURT OF JUSTICE—

QUEEN'S BENCH DIVISION.

IN RE WILSON *v.* MCGUIRE.

1883*
February 6.

[*Reported 2 Ontario Reports, 118.*]

Division Courts, power to appoint Judges of—B. N. A. Act, s. 96.

In the Province of Ontario there were in existence at the Union, in addition to the Superior and County Courts, other Courts, styled Division Courts, for the trial of small causes; of these Division Courts there were several in every county; and they had since their establishment been always presided over by the County Court Judges. An Ontario Statute, passed after the Union, provided in effect that two or more counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and the Act conferred on the County Court Judges of grouped counties the same authority to try suits in each of the grouped counties as they possessed in their own counties respectively:

Held, that the Provincial Legislature had complete jurisdiction over the Division Courts, and could appoint the officers to preside over them, and that the enactment in question, as regarded these Courts, was valid. (1)

ARMOUR, J., dissenting.

Mr. *Bartram* moved on notice for a prohibition.

It appeared that on the 13th July, 1882, an affidavit was made by Mr. *Bartram*, stating that he was acting for George McGuire: that a judgment summons was issued out of the First Division Court of the County of Middlesex, on a judgment recovered against McGuire at the suit of Alexander Wilson for $7.61 and costs, requiring him to attend and be examined at the sittings of said Court to be held on the 30th June, 1882: that on

* Present:—HAGARTY, C.J., and ARMOUR and CAMERON, JJ.

(1) [See *Ganong* v. *Bayley*, *ante*, p. 509.]

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that day McGuire failed to attend at said sittings of said Court, which was held at the City of London by Charles Robinson, Esquire, Judge of the County Court of the County of Lambton, under the provisions of ss. 16 and 17 of "The Local Courts Act" (R. S. O. c. 42), who made an order to commit said McGuire for ten days to the common gaol of the County of Middlesex, for non-attendance to be examined, on which order a warrant of commitment would be duly issued by W. J. McIntosh, clerk of said Court, and placed in the hands of the bailiff to be executed.

On this an application for prohibition was made to Osler, J., who referred it to the full Court, the applicant having leave to file a further affidavit.

Notice of all these proceedings was given to the various parties interested.

A further affidavit was produced by Mr. *Bartram* to the effect that Mr. Elliot, the senior Judge, and Mr. Davis, the junior Judge of the Middlesex County Court, were in the City of London on the 30th day of June (the day of the sittings), and neither of them was then or before that time ill to deponent's knowledge; that he was informed by said Judges that Judge Robinson had acted as a Judge in the County of Middlesex, and that he did, on the 30th June, hold the sittings of the First Division Court of Middlesex at London, and made this order on McGuire, not by reason of illness or absence of the Middlesex County Judges, or on the appointment of either of them, but under a proclamation of the Lieutenant-Governor grouping the Counties of Middlesex and Lambton into a district under ss. 16 and 17 of the Local Courts Act; and that said Robinson was the duly appointed Judge of Lambton, and by virtue of the proclamation he had and still presided in the County and Division Courts of the said County of Middlesex.

Mr. *Bethune*, Q.C., and Mr. *Bartram*, in support of the motion.

Judge Robinson did not act in making the order for commitment of the defendant in the First Division Court of the County of Middlesex under the provisions of sect. 20 of the Division Courts Act, which provides for the illness or absence of the Judge, but by virtue of a proclamation of the Lieutenant-Governor of Ontario, made under the provisions of ss. 16 and 17 of the Local Courts Act, passed by the Ontario Legislature (R. S. O. c 42); and the Judges of Middlesex received their commissions as Judges of the County Court of that county. None of these Judges have been appointed or commissioned by the Governor-General as Judges of the County Court district of Middlesex and Lambton. By sect. 96 of the B. N. A. Act the Governor-General is to appoint Judges of the County Court. The effect of the Ontario "Local Courts Act," and the proclamation of the Lieutenant-Governor of Ontario, is to create the Judge of Lambton a Judge of the County Court of Middlesex, which power is vested only in the Governor-General. The Judges of this honourable Court required new commissions in consequence of the Judicature Act.

Mr. *Irving*, Q.C., for the Attorney-General, *contra*.

Prohibition will not be granted if in any case the Judge of Lambton could have acted as Judge in the First Division Court of Middlesex. It is within the power of the Ontario Legislature to appoint Judges of the Division Courts, and Judge Robinson might have been so appointed, notwithstanding he held the office of Judge of Lambton. The proclamation under the Local Courts Act is sufficient to legally constitute him a Judge in the Division Courts of Middlesex, even if it did not make him a Judge of the County Court of Middlesex. The

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Local Courts Act is not to create Judges, but to enlarge the jurisdiction of these Courts. By sect. 92, sub-s. 14, of the B. N. A. Act, the maintenance and organization of Provincial Courts is vested in the Provincial Legislatures. In the exercise of this power the jurisdictions of the County Courts of Lambton and Middlesex are enlarged, and the Judges are given concurrent jurisdiction in both Courts.

Bethune, Q.C., in reply.

It is not a question of jurisdiction of the Judge of the County Court, but of the territory in which such jurisdiction may be exercised. The commission of the Judge confines him to a certain county. Judge Robinson was not legally appointed Judge of the County Court District, and it was only as such that he could act in the Division Courts of Middlesex. It follows that he was not legally authorized to make the order in this case, and prohibition should go.

HAGARTY, C.J.:—

I propose as far as possible to confine this discussion to the one point, the authority to make the order on McGuire in the Division Court.

The argument assumed a wider range, but the point for decision may be compressed within narrow limits.

It is admitted that the Lambton Judge acted under the powers conferred by the Local Courts Act: R. S. O. c. 42, s. 16.

Sect. 16 allows any part or parts of Ontario to be divided into districts or groups of counties by proclamation of the Lieutenant-Governor, with power (sub-s. 2) to dissolve, alter, or rearrange, etc.

Sect. 17: "After the erection of a district, ... the several County Courts, Courts of General Sessions, Division Courts," etc., etc., and all other Courts which

a County Judge may hold in each county, shall be held by the Judges (including therein the Junior Judges) in the district, in rotation," etc.

Sect. 18: "The Judges in any or each district so erected shall meet together at least once in every year; and the Judges present, or a majority of them, shall arrange and appoint which of the said Courts in the district shall be held by each of the Judges of the district throughout the ensuing year," etc.

Sub-s. 2: "Such Judges may also, subject to the approval of the Lieutenant-Governor in Council, . . . fix and appoint the times . . . for the holding of the County Courts and General Sessions," etc.

Sect. 22: "The Judge of any county, forming part of a district, may, if he sees occasion, perform in any part of the district any judicial acts affecting the Courts or business of the county of which his commission designates him as Judge," etc.

Sect. 10 declares that "every County Court Judge, not including a Deputy Judge, shall be *ex officio* a Justice of the Peace for every county and part of Ontario, and may act in the office of Justice of the Peace in any part of the Province."

These grouping clauses first appear in the Act 39 Vict. c. 14, passed 10th February, 1876.

The proclamation grouping Middlesex and Lambton under this Act was issued 10th October, 1876.

The Local Courts Act, sect. 13, requires a County Court Judge "to hold any of the Courts in any county other than his own, or to perform any other duty of a County Court Judge in any county, upon being required so to do by an order of the Governor-General made at the request of the Lieutenant-Governor; or without any such order the Judge in any county may, if he sees fit, perform any judicial duties in any county other than his

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own, on being requested to do so by the Judge to whom the duty for any reason belongs."

Sect. 14: "Any retired County Court Judge may hold any Court or perform any other duty of a County Court Judge, . . . on being requested to do so," etc.

Sect. 15 declares that no act of any Judge under ss. 13 and 14 shall be open to question in any legal proceeding, either on the ground that he was not the proper Judge to perform the duty, or that the same had not been regularly assigned to him, or had not been performed at such request or by such direction as the law requires.

This provision (except as to retired Judges) also appears in the Grouping Act of 1876, sect. 10.

Sects. 54 and 55 of the Administration of Justice Act, 1874, c. 7, give County Judges power to sit in other counties, but do not mention Division Courts.

So also 35 Vict. c. 9, s. 3, 38 Vict. c. 12, s. 5 (1874), allowed every County Judge to have jurisdiction to hold the Division Court in any county in the Province, and he may do so either by order of the Lieutenant-Governor or request of the other Judge.

The General Division Courts Act, R. S. O. c. 47, declares (sect. 19) that the Courts shall be presided over by the County Court Judges, or Junior or Deputy Judges, in their respective counties.

Under sect. 20, in case of the illness or absence of the Judge, the Judge of any other county may hold the Court, or the County Judge may appoint a barrister, etc.

See note on this clause in *Sinclair's* Division Courts Act, p. 18; *O'Brien's* Division Court Manual, notes to sect. 14 and sect. 20.

Prior to Confederation, under Con. Stat. U. C. c. 19, ss. 16, 17, the County Court Judges are to preside over the Division Courts in their respective counties, and in

case of illness or unavoidable absence of the County Judge, the County Judge of any other county may hold the Division Court, or the County Judge may appoint a barrister to act as his deputy.

Sect. 72 allows a case arising in one county to be tried in an adjoining county, on an order being made therefor. Sect. 160 may also be referred to.

Under the B. N. A. Act, sect. 96 gives to the Governor-General the appointment of Judges of the Superior, District, and County Courts in each Province, etc., and sect. 100 directs their salaries and allowances to be fixed by Parliament.

Sect. 92 empowers the Provincial Legislature exclusively to make laws in relation to property and civil rights.

Sub-s. 14: "The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

Sub-s. 16. "Generally, all matters of a merely local or private nature in the Province."

The Legislature of Ontario has complete power over the Division Courts as to their existence, constitution, rearrangement, etc.

In the case of the Superior and County Courts the general Government interpose in the power of appointing the Judges.

The County Judges appointed by the Crown have presided over these Division Courts from their establishment.

The Provincial Legislature, since their establishment, have made many changes in these Courts, enlarging their jurisdiction, and making provisions for enforcing

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their process over property and persons outside their ordinary boundaries, but have never interfered with the principle of having them presided over by a County Judge, and as already noticed, even before Confederation the Judge of another county could act in the case of illness or unavoidable absence.

As they have power to abolish such Courts and to establish others for the disposal of the like or other classes of business, I assume their right to appoint officers to preside over them.

Then, when this grouping Act was passed, regarding it solely in its bearing on Division Courts, I can see no valid objection to the Legislature directing that the Judges, senior and junior, of the grouped counties should arrange amongst themselves that the duty of presiding should be taken in rotation.

The Judges have under the statute so arranged, and the County Court Judge of Lambton under such arrangement has held this Middlesex Division Court, and made the order the execution of which is now sought to be prohibited.

I do not feel that in the case before us any difficulty is created by the fact of the Judge of Lambton being an officer appointed by the Dominion expressly for that county. It was urged that he could not perform judicial duties beyond its limits. It is sufficient here to say that he has in fact performed them under the authority of the Provincial Legislature, and that the latter, having complete power over the Division Courts, have designated him, amongst other named functionaries, to preside in the Court, and that he so presided.

I think the motion for prohibition must be refused.

My brother Cameron has partly discussed the general question in the recent case of *Regina v. Bennett* (1).

(1) 1 Ont. Rep. 445; *ante*, p. 634.

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ARMOUR, J.:—

At the sittings of the First Division Court in the County of Middlesex held in the City of London, in the County of Middlesex on the 30th June, 1882, the defendant, George McGuire, was ordered by one Charles Robinson, who assumed to preside at and hold the said sittings, to be committed to the common gaol of the County of Middlesex for ten days for his non-attendance to be examined upon a judgment summons issued in the said suit; and this motion for a prohibition was made to test the right of the said Charles Robinson to make such order. At the time the said order was made, one William Elliot was the Judge of the County Court of the County of Middlesex, and one Frederick Davis was the junior Judge of the County Court of the County of Middlesex, but neither the said William Elliot nor the said Frederick Davis was either ill or absent at the time of the holding of the said sittings of the said Division Court, at which the said order was made.

The said Charles Robinson was at the time of the holding the said sittings the Judge of the County Court of the County of Lambton, and his sole right to assume to hold the said sittings was under and by virtue of the provisions of the Statute of Ontario, 39 Vict. c. 14.

The first section of this Act provides for the grouping of counties for the purposes of the Act by proclamation of the Lieutenant-Governor; and under it a proclamation was issued by the Lieutenant-Governor, on the 10th day of October, 1876, directing that after the first day of December then next inclusive the Counties of Middlesex and Lambton should be erected into, and should constitute, a group of counties for the purposes of the said Act, and that such group of counties should be styled the County Court District of Middlesex and Lambton.

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I may here observe that the Act gives no authority to the Lieutenant-Governor to style the group so to be erected and constituted, and the styling of the said group as the County Court District of Middlesex and Lambton by the said proclamation was without the authority of law.

The second section of the Act provides that "after the erection of a district for the purposes of this Act, the several County Courts, Courts of General Sessions, Division Courts, Courts of Appeal under the Assessment Act, Courts for the revision of voters' lists, and all other Courts *which a County Judge may hold in each district*, shall be held by the Judges (including therein the junior Judges) in the district in rotation as far as may in each district be just, convenient and practicable, in view of the respective ages, length of service, and strength of the several Judges, and the special duty heretofore assigned to junior Judges, as well as in view of the other offices (if any) held by any of the Judges, and all other circumstances."

This section is reproduced in the Revised Statutes of Ontario, c. 42, as s. 17, and there the words "*which a County Judge may hold in each district*" are changed to the words "*which a County Judge may hold in each county.*" Whichever one of these two sets of words is made use of, it is difficult to understand what is meant by the section, or to say that it has, as it stands, any meaning at all, for at the time of its enactment there were no Courts which a County Court Judge might hold in each district, or in each county of such district, but only Courts which he might hold in the county of which he was the County Court Judge in each district.

In order, therefore, to give any effect to the section, it must be read as if the words were, which a County Court Judge may hold in the county of which he is the County

Court Judge in each district, and this reading appears to me, from the context, to express the intention of the Legislature.

The clear and sole effect of this section so read is to appoint the Judge of the County Court of any one of the counties grouped to be the Judge of the County Court of every other of the counties grouped, and in the case under consideration to appoint the Judge of the County Court of the County of Lambton to be a Judge of the County Court of the County of Middlesex, and to appoint the Judge and Junior Judge of the County of Middlesex to be Judges of the County Court of the County of Lambton.

The ninth section of the Act provides that "in cases hereinbefore not provided for it shall be the duty of a County Court Judge to hold any Court in any county other than his own, or to perform any other duty of a County Court Judge in any county, upon being required so to do by an order of the Governor-General, made at the request of the Lieutenant-Governor; or without any such order the Judge in any county may, if he see fit, perform any judicial duties in any county other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs."

It is unnecessary, perhaps, to advert to the first branch of this ninth section, because in the case in judgment the udge of the County Court of the County of Lambton was not holding the said sittings of the said Division Court by reason of any order of the Governor-General requiring him so to do, made at the request of the Lieutenant-Governor; and it is quite unlikely that any Governor-General would ever make any such order; nor could he legally do so, for he would thus be appointing a Judge of the County Court of one county to be the Judge of the County Court of another county by a mere order,

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when he could only do so by letters patent under the great seal, and then only to fill a vacancy.

The second branch of the ninth section in effect empowers the Judge of the County Court of any county in Ontario, by mere request, to appoint the Judge of the County Court of any other county to be the Judge of the County Court of the requester's county, and this involves two assumptions of power by the Local Legislature, viz., first, the power of appointment of County Court Judges, and, secondly, the power to delegate that power of appointment to the County Court Judges themselves.

The powers attempted to be exercised by the Local Legislature in the second and ninth sections of the said Act, appear to me to be clearly beyond the powers of the Local Legislature, and therefore null and void; and the Local Legislature appears to have been itself conscious that it was exceeding its powers by resorting to the device, weak as it is futile, of enacting in the tenth section that "no act of a County Court Judge in any county shall be open to question in any legal proceeding on the alleged ground that he was not the proper Judge to perform the duty, or that the same had not been regularly or otherwise assigned to him, or had not been performed at such request or by such direction as the law requires."

The 96th section of the B. N. A. Act expressly provides that the Governor-General shall appoint the Judges of the County Courts, and even had there been no such provision in the B. N. A. Act, the power to appoint them would have rested with the Governor-General as representing Her Majesty in the Dominion.

It is, in my opinion, beside the question raised in this case to discuss the power of the Local Legislature to appoint Judges of the Division Courts, for it has not yet assumed to appoint any such Judges, either by the Act I have been considering or otherwise, but only to appoint

County Court Judges, who, by virtue of their appointment as County Court Judges, hold the sittings of the Division Courts; and Mr. Robinson, in making the order complained of, was so making it solely by virtue of his office as Judge of the County Court of the County of Lambton, and as being assigned as such Judge of such County Court by virtue of the said Act to do the duty of the Judge or Junior Judge of the County Court of the County of Middlesex.

When that question shall arise, I will, I trust be able to shew by satisfactory reasons that the Local Legislature has no such power.

The reasoning of the Supreme Court in *Lenoir* v. *Ritchie* (1), in which case that Court determined against the power of the Local Legislature to appoint Queen's Counsel, is altogether against their having the power to appoint any Judges.

In my opinion Mr. Robinson, in making the order complained of, was acting wholly without authority, and the rule should be granted for a prohibition.

CAMERON, J., concurred with HAGARTY, C. J.

(1) 3 Can. S. C. R. 575; *ante*, vol. 1, p. 488.

ONTARIO COURT OF CHANCERY.

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LICENSE COMMISSIONERS OF PRINCE EDWARD *v.* COUNTY OF PRINCE EDWARD.

[*Reported 26 Grant, 452.*]

Temperance Act of 1864—Criminal procedure—Provincial Jurisdiction to pass an ex post facto law.

Acts of the Ontario Legislature provided that local Boards of Commissioners and Inspectors appointed by the Lieutenant-Governor should perform certain duties in their respective localities for the enforcement of the statute of the late Province of Canada called "The Temperance Act of 1864"; and that a certain proportion of the expenses attending the execution of these duties should be paid by the municipalities concerned. The Temperance Act provided for prosecutions by private persons, as well as others, for offences against the Act:

Held, that the Ontario enactments were within the competence of the Legislature.

An enactment of an *ex post facto* character by a Provincial Legislature is not void on that ground.

This was a bill filed by the Board of License Commissioners of the electoral district of Prince Edward against the Corporation of the County of Prince Edward, claiming payment of certain sums due to the plaintiffs for duties connected with carrying into effect the provisions of the Temperance Act of 1864 (1) and the Acts of

(1) [27-28 Vict. c. 18 of the late Province of Canada entitled, "An Act to amend the laws in force respecting the sale of Intoxicating Liquors and the issue of licenses therefor, and otherwise for repression of abuses resulting from such sale." This Act provided for the prohibition of the sale of intoxicating liquors on certain conditions. For other cases as to this Act, see *Hart* v. *Corporation of Missisquoi* and *Cooey* v. *Municipality of Brome*, *ante*, pp. 382, 385. See also *R.* v. *Prittie*, and *R.* v. *Lake*, *ante*, pp. 606, 616.]

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STATEMENT.

the Ontario Legislature 39 Vict. c. 26 (1), and 40 Vict. c. 18 (2).

The defendants insisted that while the Temperance Act of 1864 was in force in the said county, the Acts of the Legislature of Ontario referred to in the bill, and relating to the granting of tavern licenses in said Province, and regulating the houses for which such licenses might be granted, were in suspense and inoperative, and that neither the Board of Commissioners nor the license inspector had any legal authority or proper organization while the by-law passed under the authority of the Temperance Act of 1864, was in force in the said county. They also claimed that the Acts of the Ontario Legislature intended to add to, amend or modify the provisions of the said Temperance Act, were *ultra vires;* and that sub-section 4 of section 6 of the Act, 41 Vict. c. 14 (3) was *ex post facto* in its operation as well as *ultra vires.*

Mr. *Hodgins*, Q. C., and Mr. *Alcorn* for the plaintiffs.

Mr. *Diamond* and Mr. *Burdett* for the defendants.

SPRAGGE, C. :—

The plaintiffs are the Board of Commissioners of the electoral district of Prince Edward, and the suit is against the Corporation of the County, for the recovery of certain charges and expenses payable to the Commissioners by the County. The Commissioners are appointed under

(1) [This Act is entitled "An Act to amend the law respecting the sale of Fermented or Spirituous Liquors."]

(2) [This Act is entitled "An Act to amend the Acts respecting the sale of Fermented or Spirituous Liquors."]

(3) 41 Vict. c. 14, s. 6, sub-s. 4: "This section shall apply to all expenses heretofore incurred under the Acts passed in the 39th year of the reign of Her Majesty, chapter 26 and in the 40th year of the reign of Her Majesty, chapter 18, or under the said Revised Statute, chapter 181, and the same may be recovered by the License Board hereunder from the municipality liable by virtue of this Act to pay the same; and any notice requesting payment of its proportion heretofore given to any municipality by any Board of License Commissioners or by the members thereof shall be as effective as though given under this Act."

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the Provincial Act of Ontario, 39 Vict. c. 26. The county of Prince Edward is a county in which the Temperance Act of 1864 was adopted in 1875, and was in force while the proceedings which are in question in this suit were taken.

The principal question raised is whether the provisions of 39 Vict. can be made to apply to a municipality in which the Temperance Act is in force—whether those sections and subsequent sub-sections of the Act, which in terms make it applicable to such a municipality are not *ultra vires*.

The Act constitutes a Board of License Commissioners to discharge duties, which under a previous Act, 37 Vict. c 32, were to be discharged by other officers or bodies: municipal councils, or commissioners of police, according to the municipality. The purpose of each of these Acts was to regulate the issue of tavern and shop licenses, and to regulate the sale of intoxicating liquors.

Sect. 27 of the later Act [39 Vict. c. 26] provides that nothing therein contained "shall be construed to affect or impair any of the provisions of 'the Temperance Act of 1864' of the late Province of Canada, all of which, so far as the same are within the jurisdiction of this Legislature are declared to be in full force and effect; and no tavern or shop license shall be issued or take effect within any county, city, town, incorporated village, or township in Ontario within which any by-law for prohibiting the sale of liquor under the said Act is in force."

Sub-section 2 provides that "the Lieutenant-Governor in council may, notwithstanding any such by-law affects the whole of any county, nominate a board of commissioners of the number and for the period mentioned in the first section of this Act, and also an inspector; and the said board and inspector shall have, discharge, and exercise all such powers and duties respectively for pre-

venting the sale, traffic, or disposal of liquor contrary to said Act, or this Act, as they respectively have or should perform under this Act;" and sub-sect. 3 provides that "the board of license commissioners and the inspector appointed under this Act shall exercise and discharge all their respective powers and duties for the enforcement of the provisions of the Temperance Act of 1864, (as well as of this Act, so far as the same shall apply), within the limits of any county, city, incorporated village, or township in which any by-law under the said Temperance Act is in force."

We have to look at the earlier of these two Acts to see whether the duties of the officers and bodies to whom these duties were committed, conflict with the provisions of the Temperance Act. The first duty committed to them is to make by-laws in relation to licenses; and this, as a matter of course, is restricted to those municipalities where the Temperance Act is not in force. The Act imposes penalties for the infraction of its provisions, and by section 54 (1), the Lieutenant-Governor is empowered to appoint one or more Provincial officers for the purpose of enforcing the observance of the provisions of the Act; and municipal councils and commissioners of police are directed to appoint officers for the like purpose, and to define their duties.

Taking then, the two Acts together, we find the duties

(1) 37 Vict. c. 32, s. 54: "The Lieutenant-Governor may appoint one or more provincial officers, whose duty it shall be to enforce the observance of the provisions of this Act; and the council of every county, township, town, and incorporated village, and the commissioners of police in each city shall, some time in the month of February in each year, appoint an officer or officers for the municipality, for the like purposes, and for the observance and enforcement of any by-law of the municipality, with respect to tavern and shop licenses, and shall fix and define the duties, powers, and privileges of the officer or officers so appointed, the remuneration he or they shall receive, and the security to be given for the efficient discharge of the duties of the said office."

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of the Board of License Commissioners, constituted by the later of the two, to be, as regards municipalities in which the Temperance Act is in force, to enforce the provisions of that Act; and to appoint officers with defined duties for that purpose. There is nothing in either of these Acts to interfere with the procedure which is prescribed by the Temperance Act itself; and there is nothing in the Temperance Act to exclude such persons as the License Commissioners from prosecuting for infractions of the Act: they may well come under sub section 3 of section 34 of the Act (1). If the 39 Vict. altered the modes of procedure, it would probably be open to the objection that it was interfering with that which was the province of the general government, "the procedure in criminal matters." It has been held that prosecutions for penalties under the Temperance Act, are proceedings in criminal matters.

There appears to me, therefore, to be no ground for the objection that the provisions of 39 Vict. c. 26 in relation to the Temperance Act are unconstitutional. In my opinion it was within the competency of the Provincial Legislature to appoint commissioners for the purposes for which they were appointed; and to provide for the charges attending the execution of their duties in the way in which they are provided for. As to the objection to

(1) 27-28 Vict. c. 18 (Temperance Act of 1864) s. 34: "In Upper Canada, all such penalties shall be disposed of in the following manner, that is to say":

"2. If the prosecution was brought by or in the name of the corporation of a municipality or by or in the name of any person authorized by the Council thereof, the whole shall belong to such corporation; and the Council of the municipality may pay over not more than one-half thereof, either to such person or to any other person upon whose information the prosecution may have been instituted;

"3. If the prosecution was brought by or in the name of any person not so authorized, the penalty shall belong to the corporation of the municipality whose by-law is thereby enforced; and in that case, the Council may pay over to any other person upon whose information the prosecution may have been instituted, not more than one-half of the whole penalty or may apply the same to municipal purposes as they see fit."

the Act of 1878 (41 Vict. c. 14), that it provides for the payment by municipalities of expenses previously incurred, I have no doubt of the competency of the Legislature so to provide, or of the construction of the sections of the Act by which such provision is made.

[The remainder of the judgment is omitted, the same not having reference to the constitutional question. The decree was for the plaintiffs.]

APPENDIX.

Resolutions for the Confederation of the Provinces on which the B. N. A. Act was based.

These Resolutions were first adopted at a conference of delegates from the three Provinces of Canada—Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island—held at Quebec on the 10th of October, 1864.

The following were the delegates who attended the conference on behalf of the respective Provinces :—

CANADA.

Hon. Sir Etienne P. Taché....*Premier.*
" J. A. Macdonald.....*Attorney-General West.*
" G. E. Cartier.....*Attorney-General East.*
" W. McDougall.....*Provincial Secretary.*
" George Brown .....*President of Council.*
" A. T. Galt .....*Finance Minister.*
" A. Campbell.....*Commissioner of Crown Lands.*
" Oliver Mowat .. ..*Postmaster-General.*
" H. L. Langevin .....*Solicitor-General East.*
" T. D'Arcy McGee.....*Minister of Agriculture.*
" J. Cockburn .....*Solicitor-General West.*
" J. C. Chapais .....*Commissioner of Public Works.*

NOVA SCOTIA.

Hon. C. Tupper.....*Provincial Secretary.*
" W. A. Henry.....*Attorney-General.*
" R. B. Dickie.
" J. McCully.
" A. G. Archibald.

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NEW BRUNSWICK.

Hon. S. L. Tilley .....*Provincial Secretary.*
" J. M. Johnston.....*Attorney-General.*
" P. Mitchell.
" C. Fisher.
" E. Chandler.
" W. H. Steeves.
" J. H. Gray.

NEWFOUNDLAND.

Hon. F. B. S. Carter.....*Speaker, House of Assembly.*
" Ambrose Shea.

PRINCE EDWARD ISLAND.

Hon. Col. Gray .....*President of Council.*
" E. Palmer .....*Attorney-General.*
" W. H. Pope .....*Provincial Secretary.*
" G. Coles.
" T. H. Haviland.
" E. Whelan.
" A. A. Macdonald.

These Resolutions were afterwards approved and adopted by the Legislatures of Canada, Nova Scotia and New Brunswick, and petitions were presented by these bodies to Her Majesty the Queen, praying that she would be graciously pleased to cause a measure to be submitted to the Imperial Parliament for the purpose of uniting the Colonies of Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island, in one Government with provisions based on the said Resolutions (1).

A Bill in accordance with the prayer of these petitions was introduced in the House of Lords on the 7th of February, 1867, and, having passed the House of Lords and the House of Commons, was assented to by Her Majesty on the 28th of March, 1867.

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(1) For the proceedings relating to the adoption of these Resolutions, see Journals of Legislative Council of Canada of 1865, pp. 69 and 130; Journals of Legislative Assembly of Canada of 1865, pp. 67, 191, 198; Journals of House of Assembly of Nova Scotia of 1866, pp. 60, 69, 70; and Journal of Assembly of New Brunswick, of 1866, pp. 184, 185.

The Legislatures of Newfoundland and Prince Edward Island did not adopt the Resolutions.

The Act provided for the confederation of Canada, Nova Scotia and New Brunswick, and contained provisions for the subsequent admission of Newfoundland, Prince Edward Island and British Columbia into the Union by Her Majesty, "on addresses from the Houses of the Parliament of Canada and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island and British Columbia."

British Columbia was admitted into the Union on July 20th, 1871, by Order of Her Majesty in Council, made on May 16th, 1871, in accordance with addresses of both Houses of the Parliament of Canada and of the Legislative Council of British Columbia. (See Statutes of Canada of 1872, pp. lxxxiv.-cvii.)

Prince Edward Island was admitted into the Union on July 1st, 1873, by Order of Her Majesty in Council, made on June 26, 1873, in accordance with addresses of both Houses of the Parliament of Canada and of the Legislative Council and House of Assembly of Prince Edward Island. (See Statutes of Canada of 1873, pp. ix.-xxiii.)

For convenience of reference, the corresponding sections of the B. N. A. Act have been added at the end of each of the Resolutions.

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1. The best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces. (B. N. A. Act, Preamble.)

2. In the Federation of the British North American Provinces, the system of Government best adapted under existing circumstances to protect the diversified interests of the several Provinces, and secure efficiency, harmony and permanency in the working of the Union, would be a General Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, charged with the control of local matters in their respective sections,—provision being made for the admission into the Union, on equitable terms, of Newfoundland, the North-West Territory, British Columbia and Vancouver. (B. N. A. Act, Preamble.)

3. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and the promotion of the best interests of the

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people of these Provinces, desire to follow the model of the British Constitution, so far as our circumstances will permit. (B. N. A. Act, Preamble.)

4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the Representative of the Sovereign duly authorized. (B. N. A. Act, s. 9.)

5. The Sovereign or Representative of the Sovereign shall be Commander-in-Chief of the Land and Naval Militia Forces. (B. N. A. Act, s. 15.)

6. There shall be a General Legislature or Parliament for the Federated Provinces, composed of a Legislative Council and a House of Commons. (B. N. A. Act, s. 17.)

7. For the purpose of forming the Legislative Council, the Federated Provinces shall be considered as consisting of three divisions: 1st, Upper Canada; 2nd, Lower Canada; 3rd, Nova Scotia, New Brunswick and Prince Edward Island; each division with an equal representation in the Legislative Council. (B. N. A. Act, s. 22.)

8. Upper Canada shall be represented in the Legislative Council by 24 members, Lower Canada by 24 members, and the three Maritime Provinces by 24 members, of which Nova Scotia shall have 10, New Brunswick 10, and Prince Edward Island 4 members. (B. N. A. Act, ss. 21, 22.)

9. The Colony of Newfoundland shall be entitled to enter the proposed Union with a representation in the Legislative Council of four members. (B. N. A. Act, s. 147.)

10. The North-West Territory, British Columbia and Vancouver shall be admitted into the Union on such terms and conditions as the Parliament of the Federated Provinces shall deem equitable, and as shall receive the assent of Her Majesty; and in the case of the Province of British Columbia or Vancouver as shall be agreed to by the Legislature of such Province. (B. N. A. Act, s. 146.)

11. The Members of the Legislative Council shall be appointed by the Crown under the Great Seal of the General Government, and

shall hold office during life ; if any Legislative Councillor shall for two consecutive sessions of Parliament, fail to give his attendance in the said Council, his seat shall thereby become vacant. (B. N.A. Act, ss. 24, 29, 31 (1).)

12 The Members of the Legislative Council shall be British subjects by birth or naturalization, of the full age of thirty years, shall possess a continuous real property qualification of four thousand dollars over and above all incumbrances, and shall be and continue worth that sum over and above their debts and liabilities ; but in the case of Newfoundland and Prince Edward Island, the property may be either real or personal. (B. N. A. Act, s. 23.)

13. If any question shall arise as to the qualification of a Legislative Councillor, the same shall be determined by the Council. (B. N. A. Act, s. 33.)

14. The first selection of the Members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces so far as a sufficient number be found qualified and willing to serve ; such Members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments, and in such nomination due regard shall be had to the claims of the Members of the Legislative Council of the opposition in each Province, so that all political parties may, as nearly as possible, be fairly represented. (B. N. A. Act, s. 25.)

15. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the Members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes. (B. N. A. Act, ss. 34, 36.)

16. Each of the Twenty-four Legislative Councillors representing Lower Canada in the Legislative Council of the General Legislature shall be appointed to represent one of the twenty-four Electoral Divisions mentioned in Schedule A of Chapter first of the Consolidated Statutes of Canada, and such Councillor shall reside or possess his qualification in the Division he is appointed to represent. (B. N. A. Act, ss. 22, 23 (6).)

17 The basis of Representation in the House of Commons shall be Population, as determined by the Official Census every ten

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years ; and the number of Members at first shall be 194, distributed as follows :

Upper Canada	82
Lower Canada	65
Nova Scotia	19
New Brunswick	15
Newfoundland	8
Prince Edward Island	5

(B. N. A. Act, s. 37.)

18. Until the Official Census of 1871 has been made up, there shall be no change in the number of Representatives from the several sections.

19. Immediately after the completion of the Census of 1871, and immediately after every decennial census thereafter, the Representation from each section in the House of Commons shall be readjusted on the basis of Population. (B. N. A. Act, s. 51.)

20. For the purpose of such readjustments, Lower Canada shall always be assigned sixty-five Members, and each of the other sections shall, at each readjustment, receive for the ten years then next succeeding, the number of Members to which it will be entitled on the same ratio of Representation to Population as Lower Canada will enjoy according to the Census last taken, by having sixty-five Members. (B. N. A. Act, s. 51.)

21. No reduction shall be made in the number of Members returned by any section, unless its population shall have decreased, relatively to the population of the whole Union, to the extent of five per centum. (B. N. A. Act, s. 51 (4).)

22. In computing at each decennial period the number of Members to which each section is entitled, no fractional parts shall be considered, unless when exceeding one-half the number entitling to a Member, in which case a Member shall be given for each such fractional part. (B. N. A. Act, s. 51 (3).)

23. The Legislature of each Province shall divide such Province into the proper number of constituencies, and define the boundaries of each of them. (B. N. A. Act, ss, 70, 80, 88, and 92 (1).)

24. The Local Legislature of each Province may, from time to time, alter the Electoral Districts for the purposes of Representa-

tion in such Local Legislature, and distribute the Representatives to which the Province is entitled in such Local Legislature, in any manner such Legislature may see fit. (*Ib.*)

25. The number of Members may at any time be increased by the General Parliament,—regard being had to the proportionate rights then existing. (B N. A. Act, s. 52.)

26. Until provisions are made by the General Parliament, all the laws which, at the date of the Proclamation constituting the Union, are in force in the Provinces respectively relating to the qualification and disqualification of any person to be elected, or to sit or vote as a Member of the Assembly in the said Provinces respectively, and relating to the qualification or disqualification of voters, and to the oaths to be taken by voters, and to Returning Officers and their powers and duties,—and relating to the proceedings at Elections, and to the period during which such elections may be continued,—and relating to the Trial of Controverted Elections, and the proceedings incident thereto,—and relating to the vacating of seats of Members, and to the issuing and execution of new Writs, in case of any seat being vacated otherwise than by a dissolution—shall respectively apply to elections of Members to serve in the House of Commons, for places situate in those Provinces respectively. (B. N. A. Act, s. 41.)

27. Every House of Commons shall continue for five years from the day of the return of the writs choosing the same, and no longer; subject, nevertheless, to be sooner prorogued or dissolved by the Governor. (B. N. A. Act, s. 50.)

28. There shall be a Session of the General Parliament once, at least, in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the General Parliament in one Session, and the first sitting thereof in the next Session. (B. N. A. Act, s. 20.)

29. The General Parliament shall have power to make Laws for the peace, welfare and good government of the Federated Provinces (saving the Sovereignty of England), and especially laws respecting the following subjects:—

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.

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3. The imposition or regulation of Duties of Customs on Imports and Exports,—except on Exports of Timber, Logs, Masts, Spars, Deals and Sawn Lumber from New Brunswick, and of Coal and other Minerals from Nova Scotia.
4. The imposition or regulation of Excise Duties.
5. The raising of money by all or any other modes or systems of Taxation.
6. The borrowing of money on the Public Credit.
7. Postal Service.
8. Lines of Steam or other Ships, Railways, Canals and other works, connecting any two or more of the Provinces together, or extending beyond the limits of any Province. (B. N. A. Act, s. 92 (10).)
9. Lines of Steamships between the Federated Provinces and other Countries. (B. N. A. Act, s. 92 (10).)
10. Telegraph Communication and the Incorporation of Telegraph Companies.
11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage.
12. The Census.
13. Militia—Military and Naval Service and Defence.
14. Beacons, Buoys and Light Houses.
15. Navigation and Shipping.
16. Quarantine.
17. Sea Coast and Inland Fisheries.
18. Ferries between any Province and a Foreign country, or between any two Provinces.
19. Currency and Coinage.
20. Banking—Incorporation of Banks, and the issue of Paper Money.
21. Savings Banks.
22. Weights and Measures.
23. Bills of Exchange and Promissory Notes.
24. Interest.
25. Legal Tender.
26. Bankruptcy and Insolvency.
27. Patents of Invention and Discovery.
28. Copy Rights.
29. Indians and Lands reserved for the Indians.
30. Naturalization and Aliens.
31. Marriage and Divorce.

32. The Criminal Law, Excepting the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal matters.

33. Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island and rendering uniform the procedure of all or any of the Courts in these Provinces; but any statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof. (B. N. A. Act, s. 94.)

34. The establishment of a General Court of Appeal for the Federated Provinces. (B. N. A. Act, s. 101.)

35. Immigration. (B. N. A. Act, s. 95.)

36. Agriculture. (B. N. A. Act, s. 95.)

37. And generally respecting all matters of a general character, not specially and exclusively reserved for the Local Governments and Legislatures.
(B. N. A. Act, s. 91.)

30. The General Government and Parliament shall have all powers necessary or proper for performing the obligations of the Federated Provinces, as part of the British Empire, to foreign countries, arising under Treaties between Great Britain and such countries. (B. N. A. Act, s. 132.)

31. The General Parliament may also, from time to time, establish additional Courts, and the General Government may appoint Judges and officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of Parliament. (B. N. A. Act, s. 101.)

32. All Courts, Judges, and officers of the several Provinces shall aid, assist and obey the General Government in the exercise of its rights and powers, and for such purposes shall be held to be Courts, Judges and officers of the General Government. (B. N. A. Act, s. 130.)

33. The General Government shall appoint and pay the Judges of the Superior Courts in each Province, and of the County Courts in Upper Canada, and Parliament shall fix their salaries. (B. N. A. Act, ss. 96, 100.)

34. Until the consolidation of the Laws of Upper Canada, New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island,

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the Judges of these Provinces, appointed by the General Government, shall be selected from their respective Bars. (B. N. A. Act, s. 97.)

35. The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada. (B. N. A. Act, s. 98.)

36. The Judges of the Court of Admiralty now receiving salaries, shall be paid by the General Government. (B. N. A. Act, s. 100.)

37. The Judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable only on the Address of both Houses of Parliament. (B. N. A. Act, s. 99.)

38. For each of the Provinces there shall be an Executive Officer, styled the Lieutenant-Governor, who shall be appointed by the Governor-General in Council, under the Great Seal of the Federated Provinces, during pleasure; such pleasure not to be exercised before the expiration of the first five years, except for cause such cause to be communicated in writing to the Lieutenant-Governor immediately after the exercise of the pleasure as aforesaid, and also by Message to both Houses of Parliament, within the first week of the first session afterwards. (B. N. A. Act, ss. 58, 59.)

39. The Lieutenant-Governor of each Province shall be paid by the General Government. (B. N. A. Act, s. 60.)

40. In undertaking to pay the salaries of the Lieutenant-Governors, the Conference does not desire to prejudice the claim of Prince Edward Island upon the Imperial Government for the amount now paid for the salary of the Lieutenant-Governor thereof.

41. The Local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of each such Province shall provide. (See B. N. A. Act, ss. 69-72, s. 88.)

42. The Local Legislature shall have power to alter or amend their Constitution from time to time. (B. N. A. Act, s. 92(1).)

43. The Local Legislature shall have power to make laws respecting the following subjects:

1. Direct taxation, and in New Brunswick the imposition of duties on the export of Timber, Logs, Masts, Spars, Deals and Sawn Lumber; and in Nova Scotia, of Coals and other Minerals. (See B. N. A. Act, s. 124.)

2. Borrowing money on the credit of the Province.
3. The establishment and tenure of local offices, and the appointment and payment of local officers.
4. Agriculture. (B. N. A. Act, s. 95.)
5. Immigration. (B. N. A. Act, s. 95.)
6. Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their denominational schools, at the time when the union goes into operation. (B. N. A. Act, s. 93.)
7. The sale and management of Public Lands, excepting lands belonging to the General Government.
8. Sea Coast and Inland Fisheries. (B. N. Act, s. 91 (12).)
9. The establishment, maintenance and management of Penitentiaries, and Public and Reformatory Prisons. (B. N. A. Act, s. 91 (28).)
10. The establishment, maintenance and management of Hospitals, Asylums, Charities, and Eleemosynary Institutions.
11. Municipal Institutions.
12. Shop, Saloon, Tavern, Auctioneer and other Licenses.
13. Local Works.
14. The incorporation of Private or Local Companies, except such as relate to matters assigned to the General Parliament.
15. Property and Civil Rights, excepting those portions thereof assigned to the General Parliament.
16. Inflicting punishment by fine, penalties, imprisonment, or otherwise, for the breach of laws passed in relation to any subject within their jurisdiction.
17. The Administration of Justice, including the constitution, maintenance and organization of the Courts, both of Civil and Criminal jurisdiction, and including also the procedure in civil matters.
18. And generally all matters of a private or local nature, not assigned to the General Parliament.
(B. N. A. Act, s. 92.)

44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant Governor of each Province in Council, subject to any instructions he may, from time to time, receive from the General Government, and subject to any provisions that may be made in this behalf by the General Parliament.

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45. In regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede those made by the Local Legislature, and the latter shall be void so far as they are repugnant to, or inconsistent with, the former.

46. Both the English and French languages may be employed in the General Parliament and in its proceedings, and in the Local Legislature of Lower Canada, and also in the Federal Courts and in the Courts of Lower Canada. (B. N. A. Act, s. 133.)

47. No lands or property belonging to the General or Local Government shall be liable to taxation. (B. N. A. Act, s. 125.)

48. All Bills for appropriating any part of the Public Revenue, or for imposing any new Tax or Impost, shall originate in the House of Commons or House of Assembly, as the case may be. (B. N. A. Act, s. 53.)

49. The House of Commons or House of Assembly shall not originate or pass any Vote, Resolution, Address, or Bill for the appropriation of any part of the Public Revenue, or of any Tax or Impost to any purpose, not first recommended by Message of the Governor-General or the Lieutenant-Governor, as the case may be, during the Session in which such Vote, Resolution, Address or Bill is passed. (B. N. A. Act, s. 54.)

50. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent, and any Bill of the Local Legislatures may, in like manner, be reserved for the consideration of the Governor-General. (B. N. A. Act, s. 55.)

51. Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto; and in like manner, any Bill passed by a Local Legislature shall be subject to disallowance by the Governor-General within one year after the passing thereof. (B N. A. Act, ss. 56, 90.)

52. The Seat of Government of the Federated Provinces shall be Ottawa, subject to the Royal Prerogative. (B. N. A. Act, s. 16.)

53. Subject to any future action of the respective Local Governments, the Seat of the Local Government in Upper Canada shall be Toronto; of Lower Canada, Quebec; and the Seats of the Local

Governments in the other Provinces shall be as at present. (B.N. A. Act, s. 68.)

54. All Stocks, Cash, Bankers' Balances and Securities for money belonging to each Province at the time of the Union, except as hereinafter mentioned, shall belong to the General Government. B.N.A. Act, s. 107.

55. The following Public Works and Property of each Province shall belong to the General Government, to wit:—

1. Canals.
2. Public Harbours.
3. Light Hous s and Piers.
4. Steamboats, Dredges and Public Vessels.
5. River and Lake Improvements.
6. Railway and Railway Stocks, Mortgages, and other debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices and other Public Buildings, except such as may be set aside by the General Government for the use of the Local Legislatures and Governments.
9. Property transferred by the Imperial Government and known as Ordnance Property.
10. Armories, Drill Sheds, Military Clothing and Munitions of War; and
11. Lands set apart for public purposes.

(B.N.A. Act, s. 108 and Sched. 3.)

56. All Lands, Mines, Minerals and Royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick, and Prince Edward Island, for the use of such Provinces, shall belong to the Local Government of the territory in which the same are so situate; subject to any trusts that may exist in respect to any of such lands or to any interest of other persons in respect of the same. (B. N. A. Act, s. 109.)

57. All sums due from purchasers or lessees of such lands, mines or minerals at the time of the Union, shall also belong to the Local Governments. (B. N. A. Act, s. 109.)

58. All Assets connected with such portions of the Public Debt of any Province as are assumed by the Local Governments, shall also belong to those Governments respectively. (B N. A. Act, s. 110.)

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59. The several Provinces shall retain all other Public Property therein, subject to the right of the General Government to assume any Lands or Public Property required for Fortifications or the Defence of the Country. (B.N.A. Act, s. 117.)

60. The General Government shall assume all the Debts and Liabilities of each Province. (B.N.A. Act, s. 111.)

61. The Debt of Canada, not specially assumed by Upper and Lower Canada respectively, shall not exceed, at the time of the Union, $62,500,000; Nova Scotia shall enter the Union, with a debt not exceeding $8,000,000; and New Brunswick with a debt not exceeding $7,000,000. (B.N.A. Act ss. 112, 114, 115.)

62. In case Nova Scotia or New Brunswick do not incur liabilities beyond those for which their Governments are now bound, and which shall make their debts, at the date of Union, less than $8,000,000 and $7,000,000 respectively, they shall be entitled to interest at five per cent. on the amount not so incurred, in like manner as is hereinafter provided for Newfoundland and Prince Edward Island; the foregoing resolution being in no respec tintended to limit the powers given to the respective Governments of those Provinces by Legislative authority, but only to limit the maximum amount of charge to be assumed by the General Government; provided always that the powers so conferred by the respective Legislatures shall be exercised within five years from this date or the same shall then lapse. (B.N.A. Act, s. 116.)

63. Newfoundland and Prince Edward Island, not having incurred debts equal to those of the other Provinces, shall be entitled to receive, by half-yearly payments, in advance, from the General Government, the interest at five per cent. on the difference between the actual amount of their respective debts at the time of the union, and the average amount of indebtedness per head of the population of Canada, Nova Scotia and New Brunswick.

64. In consideration of the transfer to the General Parliament, of the powers of taxation, an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population, as established by the Census of 1861; the population of Newfoundland being estimated at 130,000. Such aid shall be in full settlement of all future demands upon the General Government for local purposes, and shall be paid half-yearly in advance to each Province. (B.N.A. Act, s. 118.)

65. The position of New Brunswick being such as to entail large immediate charges upon her local revenues, it is agreed that for the period of ten years from the time when the Union takes effect, an additional allowance of $63,000 per annum shall be made to that Province. But that so long as the liability of that Province remains under $7,000,000, a deduction equal to the interest on such deficiency shall be made from the $63,000. (B. N. A. Act, s. 119.)

66. In consideration of the surrender to the General Government, by Newfoundland, of all its rights in Mines and Minerals, and of all the ungranted and unoccupied Lands of the Crown, it is agreed that the sum of $150,000 shall each year be paid to that Province by semi-annual payments ; provided that that Colony shall retain the right of opening, constructing and controlling roads and bridges through any of the said lands, subject to any laws which the General Parliament may pass in respect of the same.

67. All engagements that may, before the Union, be entered into with the Imperial Government for the defence of the country, shall be assumed by the General Government.

68. The General Government shall secure without delay, the completion of the Intercolonial Railway from Rivière du Loup, through New Brunswick, to Truro in Nova Scotia. (B. N. A. Act, s. 145.)

69. The communications with the North-West Territory, and the improvements required for the development of the trade of the Great West with the seaboard, are regarded by this Conference as subjects of the highest importance to the Federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.

70. The sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference.

71. That Her Majesty the Queen be solicited to determine the rank and name of the Federated Provinces.

72. The proceedings of the Conference shall be authenticated by the signatures of the Delegates. and submitted by each Delegation to its own Government, and the Chairman is authorized to submit a copy to the Governor-General for transmission to the Secretary of State for the Colonies.

APPENDIX. II

RUSSELL v. THE QUEEN. — ARGUMENT.

This Appendix contains the argument in *Russell* v. *The Queen* as reported 7 App. Cas. 829, the report of that case as printed in this volume having been taken from the *Law Times* which did not give any argument.

Mr. *Benjamin*, Q.C., and Mr. *Reginald Brown* for the appellant, contended that the Dominion Parliament had no power to pass the Act in question: see *Citizens Insurance Company* v. *Parsons* (1), according to which it is not necessary to shew that the Act comes exclusively within sect. 91 of the B. N. A. Act, 1867, for the two sections may be read together. Reference was made to sects. 91 and 92, sub-sects. 9, 13, 16, to sects. 94 and 121. The rules laid down in *Parsons' Case* (1) are that it must be ascertained (1) whether the subject comes within any of the classes enumerated under sect. 92; (2) if so, does it also come within any of the classes enumerated under sect. 91; (3) if it is within both, is the power of the Provincial Legislature overborne by the power of the Dominion Parliament. Up to the time of the passing of the Act of 1867 the Legislatures of the several Provinces had always exercised the power of dealing with the sale of liquors within their Provinces, and with the granting of licenses for the purposes of local revenue. They distributed the right of granting such licenses amongst the various municipalities for purely local purposes: see New Brunswick Acts, 11 Vict. c. 61, s. 59; 17 Vict. c. 15, s. 21; 22 Vict. c. 8, s. 74; 36 Vict. c. 10, s. 32. All provided fees for licenses. Under the Provincial Acts prior to 1867, the municipalities had a revenue, the power of legislating with regard to which is preserved to the Provincial Legislatures by sub-sect. 9 of sect. 92. These licensing powers were continued in the municipalities by sect. 29 of 39 Vict. c. 105 (Consolidated Statutes of New Brunswick, 1876), and were in force up to the 1st of May, 1879. The Local Legislatures had exclusive power to raise money by licenses, and the Dominion cannot interfere therewith by legislating with regard to the commodities which are the subjects of licenses. The Legislature having treated this as

(1) 7 App. Cas. 96, 107; *ante*, vol. 1, p. 265.

a local matter, can the Courts say that it is not? This is a law in relation to licenses of a local nature; if a criminal law it comes under sub-sect. 15 of sect. 92. It is not a law for the peace, order and good government of Canada, for it is a law relating to a locality. If it applied to the whole Dominion without local option, it would then be within the power of the Dominion Parliament. Reference was made to *Keefe* v. *McLennan* (1) decided 12th December, 1876, and *L'Union St. Jacques de Montreal* v. *Belisle* (2). Even if the Dominion Parliament possessed the powers which it assumed to exercise by this Act, it had no power to delegate them and to give local authorities the right to say whether the provisions of the Act should be operative or not.

(SIR MONTAGUE E. SMITH :—Their Lordships do not require to hear the respondent's counsel in reference to sub-sects. 9 and 13, but only in regard to sub-sect. 16.)

Mr. *Maclaren*, Q.C., and Mr. *Fullarton* for the respondent :—

The words "matters of a merely local or private nature in the Province" mean matters, the interest or effect of which does not transcend the locality or the private person. If a matter can only affect the particular locality directly or indirectly, then it is left to local legislation. If, on the other hand, such private or local matter falls within any of the subjects enumerated in sect. 91, provincial legislation cannot deal with it. Drunkenness affects the whole community, its character, health, and efficiency more than any other matter; and giving local option does not render the Act which deals with such a matter local in its nature. On the contrary, local option is usually given where the subject is of great general interest, opinion divided as to the change, and large interests threatened thereby. This is the case here. One test whether a matter is "merely" (a restrictive word) local or private is the magnitude of the interests involved, such as temperance, education, public rights, health etc. Reference was made to the Quebec Resolutions (No. 45), which are referred to in the preamble of the Act of 1867 as the foundation of the Act: See Doutre's Constitution of Canada, Appendix page 389. The Resolution No 45 is given effect to by the words in sect. 91: "Notwithstanding anything in this Act," etc., etc. Reference was then made to *The Queen* v. *Justices of King's* (3); *The Queen* v. *Taylor* (4); *Cooey* v. *Municipality of the Corpor*

(1) 2 R. & C. 5; *ante*, p. 400.
(2) L. R. 6 P. C. 31; *ante*, vol. 1. p. 63.
(3) 2 Pug. 535; *ante*, p. 499.
(4) 36 U. C. Q. B. 218.

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ation of Brome (1); *Hart et la Corporation du Comté de Missisquoi* 2); *Poitras* v. *Corporation of Quebec* (3); *The Queen* v. *Boardman* (4). The condition annexed to the legislation involved in giving local option does not imply any delegation of legislative power. *The Queen* v. *Burah* (5).

Further, the case comes within the words, "regulation of trade and commerce" in sect. 91, sub-s. 2. The Act, moreover, is a criminal statute, creating a new offence, the whole tenor being of a criminal nature; see 31 Vict. c. 1 (Interpretation Act), s. 7, sub-s. 20 (Canada) making this offence a misdemeanor. It is therefore within sect. 91, sub-s. 20. (SIR JAMES HANNEN:—If the subject matter be purely provincial, could the Dominion Parliament take possession of it by making it criminal?) The following are instances of Acts originally of merely municipal character, but since the B. N. A. Act, 1867, dealt with by Dominion legislation: *cf.* 32 & 33 Vict. c. 28, c. 27, and c. 22, ss. 25, 26, as respectively affecting 29 & 30 Vict. c. 51 (Canada), s. 284, sub-ss. 8, 9: s. 269, sub-s. 5, and sub-ss. 13, 14.

Brown replied.

(1) 21 L. C. J. 183; *ante*; p. 385.
(2) 2 Q. L. R. 170; *ante*, p. 382.
(3) 9 Rev. Leg. 531; *ante*, p. 376, *n.*
(4) 30 U. C. Q. B. 553; *ante*, 1, p. 676.
(5) 3 App. Cas. 889, 906.

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———Trial for Felony . . i. 57
See PROVINCIAL LEGISLATURES, 1.

ASSESSMENT—Indian Lands. i. 831
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——— Income of Dominion officer i. 592
See PROVINCIAL LEGISLATURES, 6.

ASSURANCE POLICIES—Tax on i. 117
See LEGISLATIVE POWER, 1.

——— Contracts, Regulation of . i. 265
See TRADE AND COMMERCE, 1.

ATTORNEY-GENERAL OF ONTARIO—*Locus standi—Specific performance of Acts of Parliament.*] An Act of the Dominion Parliament incorporating a company for the purpose of constructing a bridge across the Niagara River from Canada to the United States, directed that the bridge should be "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The bridge was completed for railway purposes only and the time limited by the charter for completing the work having elapsed, an information was filed in the name of the Attorney-General of Ontario, seeking to enforce the terms of the charter, or for the removal of the bridge as a nuisance: *Held* by the Court of Appeal, reversing the decision of Spragge C., that the bridge as constructed not being a public nuisance the Attorney-General of Ontario was not the proper officer to file the information.—*Attorney-General* v. *International Bridge Co.* . . . . . ii. 559

ATTORNEY-GENERAL OF PROVINCE—Proper officer to complain of violation of public rights . i. 813
See INJURY TO PUBLIC.

BANKRUPTCY AND INSOLVENCY—*Trade and Commerce*—32-33 *Vict. c.* 16, D.—34 *Vict. c.* 2, Q.] An official assignee, or his agent, acting under an Insolvent Act of the Parliament of Canada, can sell by auction the goods of a bankrupt without taking out a license therefor; and this right cannot be restricted by a Provincial enactment.

The Quebec License Act, 1870, in so far as it seeks to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32-33 Vict. c. 16, and to restrain the powers of assignees in putting that Act in operation is invalid.—*Coté* v. *Watson*, ii. 343

See INSOLVENCY.

BANKS—Power to authorize transfer of warehouse receipts to . . i. 828
See LEGISLATIVE POWER, 5.

BILL OF LADING—33 *Vict. c.* 19, *O.*—*B. N. A. Act, s.* 91, *sub-s.* 2.] A Provincial Act to the effect that all rights of suit should pass to the consignee of goods named in any Bill of Lading, or to the endorsee thereof, to whom the property in the goods should be transferred by such consignment or endorsement, and that

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every such instrument representing goods to have been shipped should, in the hands of a consignee or endorsee for value, be conclusive evidence of shipment as against the person signing the instrument, was held not to be beyond the powers of the Provincial Legislature as being an interference with trade and commerce.—*Beard* v. *Steele* . . i. 683

BREWERS' LICENSES—*Power of Provincial Legislature to impose—37 Vict. c. 32, O.—B. N. A. Act*, 1867, *ss.* 91, 92.] The right conferred on Provincial Legislatures by sub-s. 9 of s. 92 of the B. N. A. Act to deal with "shop, saloon, tavern, auctioneer, and other licenses," does not extend to licenses on brewers.

Regina v. *Taylor*, 36 U. C. Q. B. 218, overruled. (Ritchie and Strong, JJ., dissenting.) *Severn* v. *The Queen*. . . . . i. 414

BRITISH NORTH AMERICA ACT, 1867 . . . . . i. 1

BRITISH NORTH AMERICA ACT, 1871 . . . . . i. 52

CANADA—Laws in force in late Province of . . . . . ii. 332

See ELECTION LAWS.

—— Power to legislate respecting statutes of old Parliament of . i. 351

See LEGISLATURES OF ONTARIO AND QUEBEC.

—— Statutes.

See STATUTES.

CANADA TEMPERANCE ACT, 1878—*Powers of the Dominion Parliament*.] An Act of the Parliament of Canada prohibited the traffic in intoxicating liquors, except under certain restrictions, in any county or city the inhabitants of which chose to take the steps therein prescribed for the adoption of its provisions:

Held by the Privy Council that such an Act was within the jurisdiction of the Dominion Parliament.—*Russell* v. *The Queen* . . ii. 12

CIVIL MATTERS—Penalties ii. 297

See CRIMINAL LAW, 7.

—— Procedure . . ii. 492

See PROCEDURE.

CIVIL RIGHTS—Insolvency. i. 685; ii. 237, 412

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See PROPERTY, 2.

COMMISSIONER OF PUBLIC WORKS OF ONTARIO—Approval necessary where a Provincial crosses a Dominion railway i. 822

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COMMISSIONS OF ENQUIRY—Power to issue . . . . . i. 789

See COUNTY COURT JUDGE.

—— OF OYER AND TERMINER—Power to issue . . i. 722

See PREROGATIVE OF THE CROWN.

CONTRACTS—Power to regulate. i. 265

See TRADE AND COMMERCE.

COPYRIGHT—*Right to legislate as to B. N. A. Act, s.* 91, *sub-s.* 23.] The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament, or of the Provincial Legislatures.

All that the B. N. A. Act intended to effect by s. 91, sub-s. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion.

The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to Confederation.

The Imperial Copyright Act, 5 and 6 Vict. c. 45, was in force in Canada at the time of Confederation, and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force.—*Smiles* v. *Belford* . . i. 576

COUNTY COURT JUDGE—*Charges of Misconduct—Enquiry by Commission—Court of Impeachment.*] By the B. N. A. Act, 1867, sect. 96, the Governor-General is authorized to appoint the Judges of the County Courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of County Court Judges by the Lieutenant-Governor for incapacity or misbehaviour, and had not power to pass an Act abolishing the Court of Impeachment, which existed in Canada before the B. N. A. Act, for the trial of charges against County Court Judges.

A County Court Judge may be removed by the Governor-General in Council under the Imperial Act

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22 Geo. III. c. 75, but there is no power under that Act, or the Con. Stat. C. c. 13, or under the common law, to issue a commission for a preliminary enquiry under oath with respect to such charges.—*Re Squier* . i. 789

COURT—Constitution of . ii. 602, 653
See CRIMINAL LAW, 5, 9.

CRIMINAL LAW—*B. N. A. Act*, 1867, *s.* 92, *sub-ss.* 8, 15—*Jurisdiction of Local Legislature—R. S. O. c.* 181, *s.* 57.] A Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a law of the Province made in relation to a matter coming within its exclusive jurisdiction.

In legislating in regard to a matter within Provincial jurisdiction, a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect of acts which would be criminal offences at common law.

Section 57 of the Liquor License Act of Ontario, R. S. O. c. 181, by which it was provided that any person who, on any prosecution under that Act, tampered with a witness or induced or attempted to induce any such person to absent himself or to swear falsely, should be liable to a penalty of $50, was therefore held to be invalid.—*Regina* v. *Lawrence* i. 742

——— 2. *Crime?—What is a—36 Vict. c.* 10, *s.* 4, *O.—Evidence.*] An information under an Ontario Act, for selling intoxicating liquors on Sunday, was held to be so far a charge of criminal character that the defendant could not be compelled to give evidence against himself.—*Regina* v. *Roddy* i. 709

——— 3. *Procedure—Power to regulate.*] A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.—*Paye* v. *Griffith.* ii. 308

——— 4. *Penalties—Power to regulate procedure respecting—41 Vict. c.* 3, *Q.*] A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.

An enactment of the Quebec Legislature prescribing the mode in which penalties for violations of a Statute of the Province (41 Vict. c. 3,) are to be enforced, was held to be valid.—*Coté* v. *Chauveau.* . . . ii. 311

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——— 5. *Procedure — Constitution of Court—B. N. A. Act, s.* 91, *sub-s.* 27—32-33 *Vict. c.* 31, *s.* 66, *D.*] An Act of the Parliament of Canada provided in regard to appeals from summary convictions made by Justices of the Peace, that the parties might dispense with a jury if they thought fit, and submit themselves to the judgment of the Court appealed to without a jury: *Held*, that this enactment was not an interference with the "Constitution" of the Court in (relation to which the Provincial Legislatures have exclusive jurisdiction), but that it related to criminal law and procedure in criminal matters, and therefore was within the jurisdiction of the Dominion Parliament.—*Regina* v. *Bradshaw.* . . . . ii. 602

——— 6. *Procedure—Crime—B. N. A. Act, s.* 91, *sub-s.* 27.] A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.

Breach of a Provincial Statute is not a "crime" within the meaning of s. 91, sub-s. 27 of the B. N. A. Act. —*Pope* v. *Griffith.* . . . ii. 291

——— 7. *Civil matters—B. N. A. Act, s.* 91, *sub-s.* 27; *s.* 92, *sub-s.* 15—34 *Vict. c.* 2, *Q.*] A Provincial Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to enact.

A Statute of Quebec having provided that no proceedings in civil matters before a District Magistrate should be removed to any other Court by *certiorari* or otherwise, it was held that a proceeding before a District Magistrate for the enforcement of penalties under the License Law of the Province was a civil proceeding within this enactment, and that the right to *certiorari* was taken away. —*Ex parte Duncan* . . . ii. 297

——— 8. *Selection of Jurors* — 32-33 *Vict. c.* 29, *s.* 44, *D.*] By a Dominion Statute, "for avoiding doubt," it was declared and enacted, "that every person qualified and summoned as a Grand Juror or as a Petit Juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such Juror in that Province, whether such were laws passed before or be passed after the coming into force of the B. N. A. Act, 1867, subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are

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not inconsistent with any such Act." Acts were afterwards passed by the Ontario Legislature changing the mode of selecting jurors in that Province: *Held*, that the Dominion enactment was not an unconstitutional delegation of legislative authority and was not *ultra vires*, and that a selection of jurors made in the manner prescribed by the Ontario Acts was valid for the purpose of a criminal trial.—*Regina* v. *O'Rourke*. ii. 644

——— 9. *Jurors—Constitution of Court—Criminal Procedure*]. The Acts relating to the attendance of Grand and Petit Jurors at the County Courts (Courts of criminal jurisdiction over all crimes which are not capital), are within the powers of the Local Legislature, under the B. N. A. Act, 1867, sect. 92, as pertaining to the "Administration of Justice" and the "Constitution and organization of Provincial Courts," and do not belong to the Parliament of Canada, under sect. 91 as "Procedure in criminal matters."—*Regina* v. *Foley* . . . . . ii. 653, *n.*

——— 10. *Insolvency—Con. Stat., N. B. c.* 38.] A Provincial Legislature has power to pass an enactment for the imprisonment of a person making default in payment of a sum due on a judgment in case (*a*) he has had since the date of the judgment or order, the means to pay the sum in respect of which he has made default, and neglects or refuses to pay it, or in case (*b*) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally. Weldon, J., dissenting.—*Ex parte Ellis* . . ii. 527

——— Procedure . . . ii. 678
See TEMPERANCE ACT, 1.

——— Proper officer to enforce . i. 813
See INJURY TO PUBLIC.

——— Tavern Licenses—Compromising offence . . . . . i. 676
See TAVERN AND SHOP LICENSES.

DEBTOR—*Power to provide for discharge of*—41 *Vict. c.* 8, *N. S.*] By an Act in force in the Province of Nova Scotia at the Union, every debtor imprisoned under process from any Court was entitled to apply for and obtain his discharge. When this Act was passed there were no County Courts in Nova Scotia. In 1878 an Act of the Provincial Legislature was passed, making the above provisions

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applicable to persons imprisoned under process from the County Courts, and this enactment was held to be valid.—*Johnston* v. *Poyntz*. ii. 416

DENOMINATIONAL SCHOOLS—*B. N. A. Act, s.* 93—34 *Vict. c.* 21, *N. B.*] The provisions contained in sect. 93 of the B. N. A. Act, that nothing in any law made by a Province in relation to education "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union," protects those legal rights and privileges only which existed in each Province at the Union by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal right.

At the Union the law with respect to Schools in the Province of New Brunswick was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to denominational schools, and a subsequent Act, 34 Vict. c. 21, providing that the schools conducted thereunder should be non-sectarian, was therefore held to be valid.

The constitutionality of the Act 34 Vict. c. 21, cannot be affected by any Regulations of the Board of Education made under its authority; and *semble*, if the Board of Education have made regulations, which they ought not to have made, or have not made regulations which they should have made, the case falls within subsect. 4 of sect. 93 of the B. N. A. Act.—*Ex parte Renaud* . . . ii. 445

——— Legislation respecting - i. 816
See SEPARATE SCHOOLS.

DIRECT TAXATION—Stamp duty . . . . . i. 117
See LEGISLATIVE POWER, 1.

——— Power to impose upon a particular locality for local purposes i. 95
See LEGISLATIVE POWER, 3.

DISTRIBUTION OF LEGISLATIVE POWER—
See DOMINION PARLIAMENT.
LEGISLATIVE POWER.
PROVINCIAL LEGISLATURES.

DIVISION COURTS—*Power to appoint Judges of—B. N. A. Act, s.* 96.] In the Province of Ontario there were in existence at the Union, in addition to the Superior and County Courts, other Courts styled Division Courts, for the trial of small causes; of these Division Courts there were several

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in every County; and they had since their establishment been always presided over by the County Court Judges. An Ontario Statute, passed after the Union, provided in effect that two or more counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and the Act conferred on the County Court Judges of grouped counties, the same authority to try suits in each of the grouped counties, as they possessed in their own counties respectively: *Held*, that the Provincial Legislature had complete jurisdiction over the Division Courts, and could appoint the officers to preside over them, and that the enactment in question, as regarded these Courts, was valid. Armour, J., dissenting.—*Wilson* v. *McGuire*. . . . . ii. 665

DOMICILE—Debts . . . i. 777
See PROVINCIAL LEGISLATURES, 7.

DOMINION CONTROVERTED ELECTIONS ACT—Election Courts . . . . . i. 158
See PROVINCIAL COURTS.

DOMINION OFFICER—Power to tax income of . . . . . i. 592
See PROVINCIAL LEGISLATURES, 6.

———*Seizure of Salary of*—38 *Vict. c.* 12, *s.* 5, *Q.*] A Provincial Legislature has no power to declare liable to seizure the salaries of employees of the Federal Government.—*Evans* v. *Hudon* . . . . . ii. 346

DOMINION PARLIAMENT—*Authority of—Commission rogatoire*—31 *Vict. c.* 76, *D.*] Per Torrance, J. The Dominion Parliament can confer authority upon Courts and Judges in Canada, to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matter pending before any British or Foreign tribunal; and the Dominion Act, 31 Vict. c. 76, which contains provisions for this purpose, was therefore held to be valid.—*Ex parte Smith* . ii. 330

——— 2. *Powers of—Property and civil rights—Matters of a merely local or private nature*—37 *Vict. c.* 103, *D.*] The Dominion Parliament has no power to incorporate an association for the purpose of buying, leasing, and selling landed property and buildings, the operations of a society for such purpose affecting exclusively property and civil rights within the Province where they are carried on; and therefore the Act 37 Vict. c. 103, incorporating the Colonial Building and Investment Association, for such objects, was held to be *ultra vires*, though power was given by said Act to carry on operations throughout the Dominion. Monk, J., dissenting.—*Loranger* v. *The Colonial Building and Investment Association* . . ii. 275

——— 3. *Jurisdiction of—B. N. A. Act*, 1867, *s.* 108.] Under the B. N. A. Act, 1867, s. 108, read in connection with the third schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada, but not for any larger interest therein than at that date belonged to the Province.

The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd of September, 1871.

Quære, whether it was *ultra vires* of the Dominion Parliament by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement.

But held, that Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September, 1871, or otherwise.—*Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* . . . . i. 397

——— Intoxicating Liquors—Prohibition . . . . . ii. 12
See CANADA TEMPERANCE ACT, 1878.

——— Lien or Privilege—Execution ii. 412
See INSOLVENCY, 3.

——— Limitation of Appeal—Insolvency . . . . . i. 252
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——— Liquidation—Building Societies ii. 237
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——— Local works . . . ii. 257
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——— Maritime Court in one Province . . . . . i. 557
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—— Property and civil rights . i. 685
See INSOLVENCY, 1.

—— Power to impose duties on Provincial Courts . . . . . i. 158
See PROVINCIAL COURTS.

—— Statutes.
See STATUTES.

DOMINION PROPERTY IN PROVINCE—*Law of Province, effect of.*]—*Held*, following the case of the Commissioners of the Cobourg Town Trust, 22 Grant 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government; as in the event of its being found to belong to the Dominion, it must be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered.—*Re Toronto Harbour Commissioners* . . . . . i. 825

DOMINION RAILWAY—Provincial Railway Crossing, approval required . . . . . i. 822
See PROVINCIAL RAILWAY.

—— Transfer to new company . i. 233
See PROVINCIAL LEGISLATURES, 2.

EDUCATION—Denominational Schools . . . . . ii. 445
See DENOMINATIONAL SCHOOLS.

—— Imperial law, authority of i. 761
See MEDICAL PRACTITIONER.

—— Separate Schools—Legislation i. 816
See SEPARATE SCHOOLS.

ELECTIONS—*Laws in force in late Province of Canada.—B. N. A. Act, ss.* 41, 129.] An Act of Canada passed before 1867 made void any contract referring to or rising out of a Parliamentary election, even for payment of lawful expenses; the Dominion Parliament passed an Act respecting Dominion elections, but not containing this or any like provision: *Held*, that this provision, not having been repealed, was in force in Quebec as respects Dominion elections under ss. 41 and 129 of the B. N. A. Act, and that therefore a promissory note given for the expenses of a subsequent Dominion election was void.—*Willett* v. *DeGrosbois* . . . ii. 332

EVIDENCE—Crime . . . . i. 709
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EX POST FACTO LAW—Provincial Jurisdiction to pass . . ii. 678
See TEMPERANCE ACT, 1.

EXTRADITION—*Regulation of by Imperial Enactment.—B. N. A. Act, s.* 132.] The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding the B. N. A. Act, previously passed, gives to the Canadian Parliament jurisdiction to carry out obligations resulting from extradition treaties.—*Ex parte Worms* ii. 315

FEDERAL COMPANY—Power to dissolve or transfer to new company i. 223
See PROVINCIAL LEGISLATURES, 2.

FINES—Power to appropriate . ii. 250
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—— AND PENALTIES—Power to impose . . . . . ii. 489
See LICENSES.

—— AND IMPRISONMENT—Power of Provincial Legislature to authorize punishment of same offence by both modes.—*Ex parte Papin* ii. 320
—— —— ii. 322
Paige v. *Griffith* ii. 324

FIRE INSURANCE CONTRACTS—Regulation of . . . i. 265
See TRADE AND COMMERCE, 1.

FIRE MARSHALS—Court of . i. 57
See PROVINCIAL LEGISLATURES, 1.

FISHERIES—*Regulation and protection of—B. N. A. Act, ss.* 91, 92, 109—*Property and civil rights*—31 *Vict. c.* 60, *D.*] The B. N. A. Act in assigning to the Parliament of Canada the right to legislate with respect to Sea Coast and Inland Fisheries, did not thereby give authority to deal with questions of property and civil rights, such as the ownership of the beds of the rivers, or of the fisheries, or the right of individuals therein.

What the Act gave to Parliament was a right to legislate in regard to matters of national and general concern, such as the forbidding fish to be taken at improper seasons, or in an improper manner, or with destructive instruments—such general laws as are for the benefit of the public at large as well as of the owner.

Under the B. N. A. Act the exclusive rights of fishing vested in the proprietors of non-navigable rivers being in every sense of the word "property," can be interfered with only by the Provincial Legislatures in exercise of the powers given to them to legislate respecting property and matters of a local or private nature.

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The rights of the Provincial Governments in respect of fisheries in non-navigable waters, the beds of which, not having been granted before Confederation, were then vested in the Provinces as part of the public domain, do not differ from the rights of private owners which had been acquired by grant from the Crown before that date, and a lease made by the Minister of Marine and Fisheries of a non-navigable portion of a river in the Province of New Brunswick, passing partly through granted and partly through ungranted lands, was therefore held to be void. — *The Queen* v. *Robertson* . . . ii. 65

GAOL LIMITS—Power to alter ii. 487
See INSOLVENCY, 4.

GOVERNOR-GENERAL — Appeal to under sect. 93 of the B. N. A. Act—Education . . . i. 816
See SEPARATE SCHOOLS.

HARBOUR — Property of Dominion . . . . . ii. 147
See PUBLIC HARBOUR.

HARD LABOUR—*Power of Provincial Legislatures to impose punishment of—B. N. A. Act, s.* 92, *sub-ss.* 8, 9.] A Provincial Legislature has power to enforce any of its laws by imposing hard labour as a punishment for the violation of them.

Per Sprague, C.J.: The jurisdiction of a Provincial Legislature to legislate respecting licenses is not confined to the object of raising a revenue.—*Regina* v. *Frawley* . . . ii. 576

IMPERIAL ACTS Copyright i. 576
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——— Extradition . . . ii. 315
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——— Medical Practitioner—Registration . . . . . i. 761
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IMPRISONMENT AND FINE—Power of Provincial Legislature to impose . . . ii. 320, 322, 324
See FINE AND IMPRISONMENT.

——— for debt, power to abolish ii. 494
See INSOLVENCY, 5.

——— discharge of debtor . ii. 421
See INSOLVENCY, 6.

INDIAN LANDS.—*Power to tax—B. N. A. Act, s.* 91, *sub-s.* 24.] Those "lands reserved for the Indians," which by s. 91, sub-s. 24, of the B. N. A. Act, are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, and have been reserved for their use, and do not include lands to which the Indian title has been extinguished.

The Ontario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold; all unpatented lands, whether Indian lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation.—*Church* v. *Fenton* . . . . . i. 831

INFORMATION—Bridge—Nuisance, ii. 559
See ATTORNEY-GENERAL.

——— Proper person to file . i. 813
See INJURY TO PUBLIC.

INJURY TO PUBLIC—*Proper officer to complain of—Information.*] The Attorney-General of the Province is the officer of the Crown who is considered as present in the Courts of the Province to assert the rights of the Crown, and of those who are under its protection.

The Attorney-General of the Province, and not the Attorney-General of the Dominion, is the proper party to file an information where the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the Public of the Province, even though such rights are created by an Act of the Parliament of the Dominion.

The Attorney General of the Province is the proper person to file an information in respect of a nuisance caused by interference with a railway.

Though the power of making criminal laws is vested in the Dominion Parliament, the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of Justice in the Province. *Attorney-General* v. *Niagara Falls International Bridge Co.* i. 813

——— Public nuisance . . ii. 559
See ATTORNEY-GENERAL.

INSOLVENCY—*B. N. A. Act, s.* 91, *sub-s.* 21.—*Property and civil rights—*32-33 *Vict. c* 16, *s* 50, *D.*] Section 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of the County Court or by the County Court on petition, and not by any suit,

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attachment, opposition, seizure, or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because, at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869.—*Crombie* v. *Jackson* . . . . . i. 685

—— 2. *Civil rights—Liquidation*—42 *Vict. c.* 48, *D.*] An Act of the Dominion, assuming to provide for the liquidation of all Building societies in the Province of Quebec, whether solvent or not, was held to be beyond the competence of the Dominion Parliament. — *McClanaghan* v. *The St. Ann's Mutual Building Society* . ii. 237

—— 3. *Civil rights*—32-33 *Vict. c.* 16, *s.* 59, *D.*] Section 59 of the Dominion Insolvent Act of 1869 provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if, before the payment over to the plaintiff of the moneys levied, the estate of the debtor had been assigned or placed in liquidation under that Act:

Held, to be within the competence of the Dominion Parliament.—*Kinney* v. *Dudman* . . . . . ii. 412

—— 4. *Gaol limits, power to alter*—30 *Vict. c.* 28; 31 *Vict. c.* 29, *N. B.*] The Legislature of New Brunswick prior to the Union passed an Act extending the gaol limits. This Act was not to come into operation until April 1, 1868, and before that date but after the Union it was repealed by a subsequent enactment:

Held, that the subject of gaol limits does not so relate to insolvency as to make the repealing Act *ultra vires*.—*McAlmon* v. *Pine* . . . . ii. 487

—— 5. *Imprisonment for debt, power of Local Legislature to abolish*] An Act of the Legislature of New Brunswick, abolishing imprisonment for debt, was held not to be *ultra vires*, as respects a party not shewn to be a trader or subject to the Dominion Insolvent Act.—*Armstrong* v. *McCutchin* . . . . . ii. 494

—— 6. *B. N. A. Act, s.* 91, *sub-s.* 21.] An Act which provides for the examination of a debtor before a Judge, and which authorizes the Judge to grant the debtor a discharge from gaol or the limits as to the suit for which he was confined, on proof that he is unable to pay his debts, and that he has made no fraudulent transfer or undue preference, is an insolvent Act which a Provincial Legislature has no power to pass, since the B. N. A. Act came into force, and the assent of the Governor-General does not make such an enactment valid.—*The Queen* v. *Chandler* . ii. 421

—— Imprisonment . . ii. 527
See CRIMINAL LAW, 10.

—— Matter of a local or private nature in the Province . . i. 63
See LEGISLATIVE POWER, 2.

—— Property—Bill of Sale . ii. 552
See PROPERTY, 1.

INSURANCE CONTRACTS—Regulation of . . . . . i. 265
See TRADE AND COMMERCE, 1.

INSURANCE POLICIES—Power to tax . . . . . i. 117
See LEGISLATIVE POWER, 1.

INTEREST—*Right to legislate respecting—B. N. A. Act, s.* 91, *sub-s.* 19—37 *Vict. c.* 57, *s.* 3, *Q.*] The general law having provided that on any contract or agreement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bearing the agreed rate of interest, was held to be within the competence of the Provincial Parliament.

A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalised as to other persons having the right to borrow.—*Royal Canadian Insurance Co.* v. *Montreal Warehousing Co.* . . . . . ii. 361

—— 2. *Right to legislate on subject of—B. N. A. Act, s.* 91, *sub-s.* 19] The general law having limited the rate of interest, in the absence of agreement between the parties, to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. "increase" on overdue assessments, the so-called increase being but another name for interest.

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A municipal corporation was authorized by an Act, in force at the time of Confederation, to charge ten per cent. on ove due assessments; the Legislature of Quebec passed an Act repealing this enactment and providing anew for a similar charge: *Held*, by Johnson, J., that the former enactment was effectually repealed, and that the new enactment as to increase was invalid. — *Ross* v. *Torrance* . . . . . ii. 352

INTOXICATING LIQUORS—*Power to prohibit sale of—Municipal Institutions.—B. N. A. Act, s. 92, sub-s. 8—38 Vict. c. 76, Q.*] The state of things existing in the Confederated Provinces at the time of Confederation, and more particularly that which was recognised by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act.

At the time of Confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities under the laws in force respecting municipal institutions in the then Province of Canada and in Nova Scotia, and consequently is to be deemed included in the provision as to "municipal institutions" contained in sect. 92, sub-s. 8, of the B. N. A. Act.

The Provincial Legislatures have the power for the purposes of municipal institutions to pass a prohibitory liquor law, or a liquor law which is prohibitory except under certain conditions; this power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion. —*The Corporation of Three Rivers* v. *Sulte* . . . . . ii. 280

——— 2. *Power to prohibit sale of—Trade and Commerce.*] Provincial Legislatures can make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils. —*St. Aubyn* v. *Lafrance* . ii. 392

——— 3. *Power to regulate sale of—Trade and Commerce.*] A Statute of Nova Scotia passed after Confederation, imposed penalties for retailing intoxicating liquors without a license, and provided that licenses should only be granted upon the recommendation of the Grand Jury, concurred in by two-thirds of the members present, and accompanied by a petition for the license from two-thirds of the ratepayers of the polling district in which the tavern was to be established. Enactments not essentially different were in force in the Province before Confederation:

Held, that the Act in question was not *ultra vires* of the Legislature.

Held, further, that if the restrictions were *ultra vires* the proper course was to apply for a mandamus to compel the granting of a license, and that a refusal to grant licenses did not justify selling without a license or relieve from the statutory penalty thereby incurred.

A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons or unwholesome provisions, if such legislation is made *bona fide* with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby.—*Keefe* v. *McLennan* . ii. 400

——— 4. *Sale of, power to regulate*—38 *Vict. c. 74, Q.*] The Provincial Legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may, for this purpose, restrict the sale of spirituous liquors.

The provision of the Quebec Statute, 38 Vict. c. 74, s. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays, and on every day from eleven of the clock at night, until five of the clock in the morning, is within the competence of a Provincial Legislature.—*Blouin* v. *Corporation of Quebec.* . . ii. 368

——— 5. *Prohibition—Temperance Act of 1864.*] A Provincial Legislature cannot repeal or modify those sections of the Temperance Act of 1864, 27-28 Vict. c. 18, which conferred on Municipal Councils the power to pass by-laws for prohibiting the sale of intoxicating liquors.—*Hart* v. *Corporation of the County of Missisquoi.* . ii. 382
Cooey v. *Municipality of Brome.* . ii. 385

——— Criminal Law . ii. 606, 616
See TEMPERANCE ACT OF 1864, 2.

——— Power of Dominion Parliament. . . . . ii. 12
See CANADA TEMPERANCE ACT, 1878.

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JUDGES—*Appointment of—B. N. A. Act, ss.* 92, *sub-s.* 14, *and* 96; 39 *Vict. c.* 5, *N. B.*] By an Act of the Legislature of New Brunswick since Confederation, 39 Vict. c. 5, it was provided that Courts should be established for the trial of civil causes before Commissioners appointed by the Lieutenant-Governor in Council. The jurisdiction of the Commissioners was limited to $40 in actions of debt, and $16 in actions of tort; and was further restricted in special cases. On an application to set aside a judgment obtained before a Commissioner appointed as above provided, on the ground that since the passing of the B. N. A. Act, a Lieutenant-Governor had no power to appoint judges of any kind, the New Brunswick Act was held to be valid.

Allen, C J., and Duff, J., dissenting. —*Ganong* v. *Bayley* . . . ii. 509

——— Power to appoint . . ii. 665
See DIVISION COURTS.

JURORS—Selection of. . ii. 644, 653
See CRIMINAL LAW, 8, 9.

JUSTICES OF THE PEACE—*Power to appoint—B. N. A. Act, s.* 92, *sub-s.* 14.] The right of the Provincial Legislatures to legislate in relation to the Administration of Justice, includes a right to make provision for the appointment of Police Magistrates and Justices of the peace by the Lieutenant-Governor.—*Regina* v. *Bennett* . . . . . ii. 634

LEGISLATIVE ASSEMBLY OF QUEBEC—*Powers and privileges of —33 Vict. c.* 3, *Q.*] Provincial Legislatures have, as incident to their express powers under the B.N.A. Act, the right to summon witnesses, and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation, and the control assigned to them in respect of the administration of public affairs.

The provisions of the Act of the Quebec Legislature, 35 Vict. c. 5, regulating this right are valid. Ramsay, J., dissenting—*Ex parte Dansereau* . . . . ii. 165

LEGISLATIVE POWER—*Distribution of—Licenses — Stamps — Direct taxation.*] The clauses of the Act 39 Vict. c. 7 (passed by the Legislature of Quebec), which impose a tax upon certain policies of assurance and certain receipts and renewals, are not authorized by the B.N.A. Act, 1867, s. 92, sub-ss. 2, 9.

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A License Act by which a licensee is compelled neither to take out nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a Stamp Act and not a License Act.

The imposition of a stamp duty on Policies, renewals and receipts with Provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed is not warranted by the terms of an Act which authorizes the imposition of direct taxation.—*Attorney-General for Quebec* v. *The Queen Insurance Co.* i. 117

——— 2. *Matter of a local or private nature in the Province —Insolvency.*] The Act of the Legislature of Quebec (33 Vict. c. 58), for the relief of the appellant society, then (as appeared on the face of the Act) in a state of extreme financial embarrassment, is within the legislative capacity of that Legislature.

The Act was held to relate to a matter of a "merely local or private nature in the Province," which by the 92nd section of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada.—*L'Union St. Jacques de Montreal* v. *Belisle* . . . . . i. 63

——— 3. *Matter of a merely local or private nature in the Province—Direct taxation for local purposes upon a particular locality, power to impose.*] An Act of the Provincial Legislature of New Brunswick (33 Vict. c. 47), intituled "An Act to authorize the issuing of debentures on the credit of the lower District of the Parish of St. Stephen, in the County of Charlotte," which empowered the majority of the inhabitants of that parish to raise, by local taxation, a subsidy designed to promote the construction of a railway extending beyond the limits of the Province, but already authorized by statute, was held to be within the legislative capacity of the Legislature.

A Provincial Legislature can, under the B. N. A. Act, sect. 92, art. 2, impose direct taxation for a local purpose upon a particular locality within the Province.

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The Act in question was held to relate to a matter of "a merely local or private nature in the Province," which, by the 92nd section of the B. N. A. Act, is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in art. 10, sub-sect. (a) of the said section.

L'Union St. Jacques de Montreal v. *Dame Julie Belisle*, L. R. 6 P. C. 31, approved.—*Dow* v. *Black* . i. 95

——— 4. *Prerogative of the Crown to admit appeals—B. N. A. Act*, 1867, *ss.* 91, 92 - *Canadian Act*, 40 *Vict. c.* 41, *s.* 28—"*Final.*"] The B. N. A. Act, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects; consequently the Dominion enactment, 40 Vict. c. 41, s. 28, providing that the judgment of the Court of Appeal in matters of insolvency should be final, *i.e.*, not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament, and does not infringe the exclusive powers given to the Provincial Legislatures by sect. 92 of the Imperial Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code.

The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, *quære*, what powers may be possessed by the Parliament of Canada so to do.

Cuvillier v. *Aylwin* (2 Knapp's P. C. C. 72) reviewed.—*Cushing* v. *Dupuy* . . . . . i. 252

——— 5. *Property and civil rights—34 Vict. c. 5. D.—Trade and Commerce—Banking.*] The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its jurisdiction over the subjects assigned to it by the B. N. A. Act.

Per Spragge, C.:—The Dominion Act, 34 Vict. c. 5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct endorsement, is within the powers assigned to the Dominion Parliament, and is valid. —*Smith* v. *the Merchants Bank* . i. 828

——— 6. *Distribution of—Quebec Pharmacy Act*, 1875 - *Fines, power to appropriate.*] The B. N. A. Act in assigning either to the Dominion or Provincial Legislatures power to legislate on any particular subject, gives at the same time all the incidental subjects of legislation necessary to the exercise of the power so assigned.

A Provincial Legislature has authority to determine the age or other qualifications which shall be required on the part of persons resident in the Province, to entitle them to manage their own affairs, or to exercise certain professions or branches of business attended with danger or risk to the public. If laws on these subjects incidentally affect trade and commerce, this incidental power must be deemed to be included in the right to deal with those matters which are specially placed under Provincial control.

The Quebec Pharmacy Act of 1875, so far as it requires certain qualifications on the part of persons exercising the business of selling drugs and medicines, is valid.

The Provincial Legislatures have the right to appropriate fines to municipal or other corporations.—*Bennett* v. *Pharmaceutical Association of Quebec* . . . . . ii. 250

——— Copyright . . . i. 576
See COPYRIGHT.

——— Interest . . . ii. 352, 361
See INTEREST, 1, 2.

——— Maritime Court . . i. 557
See MARITIME COURT.

——— Prohibition . . . ii. 12
See CANADA TEMPERANCE ACT, 1878.

——— Provincial Courts . . i. 158
See PROVINCIAL COURTS.

LEGISLATURES OF ONTARIO AND QUEBEC—*Powers of—B. N. A. Act*, 1867, *ss.* 91, 92, 129—*Canada Act*, 22 *Vict. c.* 66—*Invalidity of Quebec Act*, 33 *Vict. c.* 64.] The powers conferred by the B. N. A. Act, 1867, s. 129, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867.

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The Act 22 Vict. c. 66, of the Province of Canada, which created a corporation having its corporate existence and rights in the Provinces of Ontario and Quebec, afterwards created by the B. N. A. Act, could not, after the B. N. A. Act, be repealed or modified by the Legislature of either of these Provinces, or by the conjoint operation of both Provincial Legislatures, but only by the Parliament of the Dominion.

The Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation which had been created by the Parliament of the Province of Canada before the B. N. A. Act, and to substitute a new corporation; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province, was held invalid.—*Citizens Insurance Company of Canada* v. *Parsons* (7 App. Cas. 96), approved and distinguished.

The first step to be taken with a view to test the validity of an Act of a Provincial Legislature under the B. N. A. Act is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in section 92, which states the legislative powers of the Provincial Legislatures. If it does not come within any of such classes, the Provincial Act is of no validity. If it does, these further questions may arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, which states the legislative powers of the Dominion Parliament, and whether the power of the Provincial Legislature is or is not thereby overborne.—*Dobie* v. *The Temporalities Board* . . i. 351

LICENSE LAW.—*Power to impose penalty for violation of—Trade and Commerce.*] The B. N. A. Act in conferring legislative jurisdiction over particular subjects, must be held to have given at the same time the powers needed for the effective exercise of the jurisdiction granted; consequently, the right conferred on Provincial Legislatures to make laws in relation to shop, saloon, tavern, auctioneer and other licenses, includes the right of imposing penalties for violating the Provincial laws in relation to those subjects.

Provincial enactments by which persons who sell liquor by wholesale

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are required to take out a license are not invalid as an interference with trade and commerce. *Ex parte Leveille*. . . . . ii. 349

LICENSES.—*Power to make laws respecting—33 Vict. c. 23, N. B.*] Provincial Legislatures can impose fines and penalties for selling liquor without license. *Regina* v. *McMillan* ii. 469

—— Butchers . . . . ii. 335, 340
See TRADE AND COMMERCE, 2.

—— Insurance . . . . i. 265
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LIEUTENANT-GOVERNOR OF ONTARIO—Commissioners to hold Courts of Assize . . . . i. 723
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LOCAL OR PRIVATE NATURE—
—— Direct taxation for local purpose. . . . . i. 95
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—— Legislative authority . i. 688
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—— Matter of—Insolvency . . i. 63
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LOCAL WORKS AND UNDERTAKINGS—*B. N. A. Act, s. 92, sub-s. 10—32 Vict. c. 54, N. B.*] By an Act of the Province of New Brunswick, passed prior to Confederation, the plaintiff Company was incorporated for the purpose of constructing a railway from the City of St. John, in that Province, westward to the boundary of the United States. After Confederation another Act (32 Vict. c. 54) was passed for the purpose of removing doubts respecting the liability of subscribers for shares in the Company, and this latter Act was held to be within the competence of the Provincial Legislature.

The fact of the Legislature of a foreign country authorizing the construction of a line of railway in that country for the purpose of connecting

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with a Provincial railway, does not in any way affect the authority of the Legislature of the Province to legislate with respect to the railway within the bounds of the Province.—*European and North American Railway Co.* v. *Thomas* . . . . ii. 439

—— 2. 43 *Vict. c.* 67, *D.*] All works which are wholly within one Province, whether the undertaking to which they belong be for a commercial purpose or otherwise, are within the control, and subject to the legislation of the Province in which they are situate, unless they are by the Parliament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

The Dominion Parliament cannot, without such declaration, authorize a company to establish in two or more Provinces, works, needing special legislative authority, and which are in their nature local in each Province, the jurisdiction in such case to give the needed authority, being determined by the location and object of the works, and not by the circumstance that the Company is authorized to make them in several Provinces.

A Company was incorporated by Act of the Dominion Parliament for the purpose of establishing telephone lines in the several Provinces of the Dominion, but not of connecting two or more Provinces by telephone lines, nor was the undertaking declared to be for the general advantage of Canada, or of two or more of the Provinces, and in the absence of these conditions it was held that the Act, so far as it professed to confer a right to erect poles in the streets of cities and towns, was invalid.—*Regina* v. *Mohr* . . . . . ii. 257

MAGISTRATES—*Right of Provincial Executive to appoint—B. N. A. Act, ss.* 96, 130.] Under the B. N. A. Act, the right to appoint Magistrates, such as District Magistrates, in the Province of Quebec, is vested in the Provincial Executives; and this right is not affected by the provisions contained in sections 96 and 130 of that Act.—*Regina* v. *Horner*. ii. 317

—— Power to appoint . . ii. 364
See JUSTICES OF THE PEACE.

MARTIME COURT—*Power to establish in one Province—40 Vict. c.* 21, *D.*] The Act 40 Vict. c. 21, D., establishing a Maritime Court, with jurisdiction limited to the Province of Ontario, is within the powers of

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the Dominion Parliament.—*The Pieton* . . . . . i. 557

MARKETS—Power to regulate . i. 756
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MEDICAL PRACTITIONER—*Registration in England—Refusal to register—B. N. A. Act, s.* 93.] The Imperial Parliament having enacted since Confederation that any person registered as a medical practitioner under the English Medical Act (21 & 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration and that the term "colony" shall include any of Her Majesty's possessions which have a Legislature, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration, notwithstanding the Confederation Act and the exclusive power given thereby to the Provinces to legislate in relation to education.—*Regina* v. *College of Physicians and Surgeons, Ontario* . i. 761

MILITARY AND NAVAL SERVICE—*B. N. A. Act, s.* 91, *sub-s.* 7—44 *& 45 Vict. c.* 58, *s.* 153, Imp.] The Parliament of Canada has, under the B. N. A. Act exclusive jurisdiction in matters relating to militia, military and naval service, and defence, and consequently, the provisions of the Imperial Army Act of 1881 do not apply to Canada, so as to make persons not connected with the Active Militia of the Dominion liable in respect of acts which are offences under the Imperial Act, but not under the Militia Act of Canada.—*Holmes* v. *Temple*. . . ii. 396

MUNICIPAL INSTITUTIONS—Market regulations . . . i. 756
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—— Prohibition . . . ii. 280
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——— Temperance . ii. 246, 606, 616
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NAVIGATION — *Commerce — Water lot on Navigable river, grant of by Provincial Government.*] The Government of the Province of Quebec having by letters patent granted a water lot extending into deep water, at the mouth of the River St. Maurice, the letters patent were held to be valid, subject to an implied restriction that the requirements of navigation and commerce were not to be interfered with or injured thereby.—*Normand* v. *The St. Lawrence Navigation Co* . . ii. 231

——— 2. *Shipping — Jurisdiction respecting*—36 *Vict c.* 54, *D.*] The Dominion Parliament can confer on the Vice-Admiralty Courts jurisdiction in any matter of navigation and shipping within the territorial limits of the Dominion.

When an Act of the Parliament of Canada is in part repugnant to an Imperial Statute, effect will be given to the former so far as its provisions do not conflict with those of the Imperial enactment.—*The Farewell.* ii. 378

——— 3. *Company, incorporation of by Provincial Legislature — B. N. A. Act, s.* 92, *sub-s.* 10—31 *Vict. c.* 25, *Q.*] The power to incorporate a navigation company, the operations of which are limited to a particular Province, belongs exclusively to the Legislature of such Province.—*Macdougall* v. *The Union Navigation Co.* . . . . . ii. 228

——— 4. *Shipping*—35 *Vict. c.* 44; 37 *Vict. c.* 107, *N. B.*] A Provincial enactment authorizing the erection of booms in a navigable river does not conflict with the power of the Parliament of Canada with respect to navigation and shipping under sect. 91 of the B. N. A. Act; the words navigation and shipping being employed in that section in the sense in which they are used in the several Acts of the Imperial Parliament relating to navigation and shipping, and in the Act of the Parliament of Canada, 31 Vict. c. 58, viz.: as giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion, and not as excluding for all purposes Provincial jurisdiction over navigable waters.—*McMillan* v. *Southwest Boom Co.* ii 542

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PREROGATIVE OF THE CROWN —*B. N. A. Act, ss.* 12, 65, 91, 92, 96— *Provisional District of Algoma — Commission of Oyer and Terminer to District Judge.*] The provisions of the B. N. A. Act have not superseded the prerogative right of the Crown to issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer and General Gaol Delivery, for trial of felonies, etc.; and such a commission by the Deputy of the Governor-General was held to be legal.

Per Wilson, J.:—The Lieutenant-Governor of Ontario, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize.—*Regina* v. *Amer* . . i. 722

——— Appeal . . . . . i. 158
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PRINCE EDWARD ISLAND—Statutes.
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PROCEDURE—*Civil matters*—32-33 *Vict. c.* 29, *s.* 134, *D.*] *Quære*, whether the Dominion Act, 32-33 Vict. c. 29, s. 134, relating to costs in actions against Justices, is not *ultra vires* of the Federal Parliament as relating to procedure in a civil matter.—*Whittier* v. *Diblee* . . . . ii. 492

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PROPERTY—*Insolvency—B. N. A. Act, s.* 92, *sub-s* 13—*Con Stat. N. B. c.* 75, *s.* 1.] An Act of the Legislature of New Brunswick, providing that as against the assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the time of the filing thereof, was held to be within the competence of the Legislature.—*In re De Veber* . . . . . ii. 552

——— 2. *Civil rights — Matters of a merely local nature—*32 *Vict. c.* 15, *Q.*] An Act of the Legislature of Quebec authorizing the Lieutenant-Governor to revoke the right of certain Municipalities to exact tolls on a toll-bridge, for default in making repairs, and to transfer the property to others, was held valid; as the matter related to property and civil rights and was of a merely local nature.—*The Municipality of Cleveland* v. *The Municipality of Melbourne and Brompton Gore* . . . . . ii. 241.

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——— Injury to public . . i. 813
See INJURY TO PUBLIC.

PROVINCIAL COURTS—*Power of Parliament of Canada to impose new duties upon Dominion Controverted Elections Act of* 1874—*Special leave to appeal.*] The Parliament of the Dominion of Canada has power to impose new duties upon existing Provincial Courts, and to give them powers as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction, consequently the Dominion Controverted Elections Act of 1874 (Canadian Stat. 37 Vict. c. 10), which confers upon the Provincial Courts jurisdiction with respect to elections to the Dominion House of Commons, is valid.

Special leave refused to appeal from two concurrent judgments of the Courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing to the Judicial Committee of the Privy Council that there was no substantial question requiring to be determined, none of their Lordships having any doubt of the soundness of the judgments, though several judges of the first instance had held the Act to be invalid.—*Valin* v. *Langlois* . i. 158

——— Precedence in . . . i. 488
See QUEEN'S COUNSEL.

PROVINCIAL EXECUTIVE—Right to appoint Magistrates . . ii. 817
See MAGISTRATES.

PROVINCIAL GOVERNMENT—Power to grant water lots on a navigable river . . . . . ii. 231
See NAVIGATION, 1.

——— Power to incorporate Navigation Company . . . . . ii. 228
See NAVIGATION, 3.

PROVINCIAL LEGISLATURES—*Jurisdiction of,—Fire Marshals—Appeal in trial for felony.*] By the Statutes of the Quebec Legislature, 31 Vict. c. 32, and 32 Vict. c. 29, Fire Commissioners or Marshals were appointed, with power to investigate the origin of any fires occurring in the cities of Quebec and Montreal; to compel the attendance of witnesses, and examine them on oath; and to commit to prison any witnesses refusing to answer without just cause: *Held*, that these Statutes were within the competency of the Provincial Legislature.

On petition by the Attorney-General of the Province of Quebec, special leave was granted to appeal from a judgment of the Queen's Bench, Quebec, on a case reserved in a trial for felony.—*The Queen* v. *Coote* . . . . . i. 57

——— 2. *Federal Company—Power to dissolve.*] A Provincial Legislature of Canada has no power to pass an Act transferring to a new company, or otherwise, a federal railway, with its appurtenances, property, rights and powers, or to dissolve a federal company, or to substitute for it a company to be governed by, and sub-

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ject to, Provincial legislation.—*Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental* . . . . . i 233

—— 3. 34 *Vict. c.* 99, *O.*—*Domicile.*] A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of whom were living, the Provincial Legislature of Ontario passed an Act (34 Vict. c. 99) for dividing the property among the testator's children forthwith: *Held*, that such an Act was within the competence of the Provincial Legislature; but the Court held further (Draper, C. J., and Spragge, C., dissenting), that the testator's grandchildren, not having been expressly named in the Act, and there being no express and explicit enactment specifically referring to and barring their rights, their interests remained unaffected by the Act.—*Re Goodhue* . . . . . i. 560

—— 4. *B. N. A. Act, ss.* 65, 137—*Administration of Justice.*] An Act of the old Province of Canada authorized the Governor to appoint Police Magistrates; the Act was temporary: *Held*, that an Act of the Ontario Legislature, continuing the same in force, was valid.—*The Queen* v. *Reno and Anderson* . . . . . i. 810

—— 5. *Municipal Corporations—Market Regulations. R. S. O. c.* 174, *s.* 466, *sub-s.* 6.] The provision contained in the Municipal Act of Ontario, authorizing City Councils to pass by-laws "for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto," is not *ultra vires* of the Ontario Legislature, as being a regulation of trade and commerce.

In giving jurisdiction to the Provincial Legislatures in all matters relating to municipal institutions, the intention must have been that these Legislatures should have power to alter and amend all the existing laws with respect to such institutions, and especially to enlarge the scope of a power existing in the Municipal Act at the time of Confederation.—*Harris* v. *City of Hamilton* . . . . i. 756

—— 6. *Power to tax income of Dominion Officer—Assessment Law.*] A Provincial Legislature cannot impose a tax upon the official income of an officer of the Dominion Government, or confer such a power upon the Municipalities.—*Leprohon* v. *City of Ottawa* . . . . . i. 592

—— 7. *Private Act, Effect of—Domicile of party affected.*] Provincial Legislatures are not restricted to legislation respecting property such as bonds held in the Province, and where debts and other obligations are authorised to be contracted under a local Act, passed in relation to a matter within the power of a Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province.—*Jones* v. *Canada Central Railway Co.* . . . i. 777

—— 8. *Sale of liquor—Prohibitory by-laws—Powers of Municipal Corporations—*32 *Vict. c.* 42, *O.*] Under the exclusive legislative authority given to it with regard to "Municipal Institutions," and to "matters of a merely local or private nature in the Province,' a Provincial Legislature can confer on municipal corporations power to pass by-laws wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses; and the conferring such power is not an interference with "the regulation of trade and commerce," assigned exclusively to the Dominion Parliament.—*Slavin* v. *Village of Orillia* . i. 688

PROVINCIAL LEGISLATURE.—
Act of, Test of Validity of . i. 361
See LEGISLATURES OF ONTARIO AND QUEBEC.

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See BREWERS' LICENSES.

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See COUNTY COURT JUDGE.

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——— Punishment. . ii. 320, 322, 324
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——— Regulation of sale of intoxicating liquors . ii. 280, 368, 392, 400
See INTOXICATING LIQUORS, 1-4.

——— Separate Schools . . i. 816
See SEPARATE SCHOOLS.

——— Temperance Act . ii. 606, 616, 678
See TEMPERANCE ACT OF 1864.

PROVINCIAL RAILWAY—*Crossing Dominion Railway—Approval required.*] Where it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the Railway Companies cannot by agreement waive this provision.—*Credit Valley Railway Co.* v. *Great Western Railway Co.* . . . . . i. 822

PUBLIC—Injury to—Proper officer to complain of . . . . . i. 813
See INJURY TO PUBLIC.

PUBLIC HARBOUR—*B. N. A. Act, s.* 108—25 *Vict. c.* 19, *P. E. I.*] The "Public Harbours," which by the B. N. A. Act are declared to be the property of the Dominion, include all harbours, together with the bed and soil thereof, which the public have the right to use, and are not limited to such as at the time of Confederation had been artificially constructed or improved at the public expense; and where a grant of part of the foreshore of a natural harbour used as such by the public, was made by the Provincial Government of Prince Edward Island subsequent to the admission of that Province into the Union, the grant was held to be invalid.—*Holman* v. *Green* . . . ii. 147

PUNISHMENT—Fine and imprisonment—Power of Provincial Legislature . . . . . ii. 320, 322, 324
See FINE AND IMPRISONMENT.

——— Hard labour . . . ii. 576
See HARD LABOUR.

QUEBEC CONTROVERTED ELECTIONS ACT, 1875—*Royal Prerogative as to admitting appeal.*] The petitioner having been declared duly elected a member to represent the electoral district of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council: *Held*, that such application must be refused.

Although the prerogative of the Crown cannot in general be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be susceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the Act was held to be that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative; and the Act having been assented to on the part of the Crown, and the Crown being therefore a party to it, there was held to be no prerogative right to admit an appeal contrary to the intention of the Act.—*Theberge* v. *Landry* . ii. 1

QUEBEC—Authority as to Laws of old Parliament of Canada . i. 351
See LEGISLATURES OF ONTARIO AND QUEBEC.

——— Privileges of Legislature . ii. 165
See LEGISLATIVE ASSEMBLY OF QUEBEC.

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—— Statutes.
See STATUTES.

QUEEN'S COUNSEL—*Appointment of—Powers of Local Legislatures.*] A Provincial Legislature has no power to authorize the Lieutenant-Governor to appoint Queen's Counsel, or to grant to any member of the Bar a patent of precedence in the Courts of the Province. (Henry, Taschereau and Gwynne, JJ.)

The question arose on an appeal by Queen's Counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the Respondent being a Queen's Counsel appointed by the Governor-General; and Strong, Fournier and Taschereau, JJ., were of opinion that the Provincial Acts under which the appellants were appointed were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General; and it was therefore held,

Per Strong and Fournier, JJ.:—That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.—*Lenoir* v. *Ritchie*. . i. 488

RAILWAY—Extending beyond limits of Province . . . . . i. 95
See LEGISLATIVE POWER, 3.

—— Federal Company, power to dissolve . . . . . i. 233
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See LOCAL WORKS, 1.

REGISTRATION — Medical practitioner . . . . . i. 761
See MEDICAL PRACTITIONER.

RIVERS—Regulation of fisheries ii. 65
See FISHERIES.

SEPARATE SCHOOLS—*Legislation respecting—B. N. A. Act, s. 93.*] A Provincial Legislature may legislate in regard to Separate Schools, provided that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province, at the time of Confederation are not prejudicially affected by such legislation

The B. N. A. Act provides by sub-s. 3 of s 93 that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;" *Held*, that this enactment gives an appeal in respect of those decisions alone which are legislative acts, or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school.

In election matters, Separate Schools have the same right of appeal to a County Judge as Public Schools have.—*Separate School Trustees of Belleville* v. *Grainger* . i. 816

—— Rights and privileges with respect to . . . . . ii. 445
See DENOMINATIONAL SCHOOLS.

SHIPPING—Jurisdiction . . ii. 378
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SHOP, SALOON, TAVERN, AUCTIONEER, AND OTHER LICENSES—Brewers' licenses . i. 414
See BREWERS' LICENSES.

—— Power to limit . . . i. 688
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—— Violation of law respecting—Punishment . . . . . i. 676
See TAVERN AND SHOP LICENSES.

SMALLWARE—Vendors and criers of—Regulation of . . . . i. 756
See PROVINCIAL LEGISLATURES, 5.

SPIRITUOUS LIQUORS—*Right of Local Legislatures to prohibit sale of—Trade and Commerce.*] A New Brunswick Statute, 36 Vict c. 10, empowered the General Sessions of the Peace to grant licenses as in their discretion they should think proper, and they having refused to grant a license to any person whatever, a mandamus was granted for the purpose of compelling them to issue a license to the applicant.

The Legislature of New Brunswick by an Act subsequent to Confederation declared that "no license for the sale of spirituous liquors shall be granted or issued within any parish or municipality in the Province when

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a majority of the ratepayers, residents in such parish or municipality shall petition the Sessions or Municipal Council against issuing any license within such parish or municipality." Prior to Confederation, there had been no legislation of this character in New Brunswick, and this enactment was held by the Supreme Court of that Province to be beyond the competence of the Legislature.—*Regina* v. *Justices of King's* . ii. 499

STAMP DUTY—Power to impose. i. 117
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TAVERN AND SHOP LICENSES—*B. N. A. Act*, *s.* 91, *sub-s.* 27; *s.* 92, *sub-ss.* 9, 15, 16—*Criminal law.*] The Legislature of Ontario having passed an Act to regulate tavern and shop licenses: *Held*, that they had power to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should, on conviction, be imprisoned in the common gaol for three months; and that such enactment was not opposed to sect. 91, sub-s. 27, of the B. N. A. Act, by which criminal law is assigned exclusively to the Dominion Parliament.—*Regina* v. *Boardman* . i. 676

TAX ON POLICIES OF INSURANCE—Power to impose . i. 117
See LEGISLATIVE POWER, 1.

TAXATION—Lands liable to . i. 831
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——— Officer of Dominion . i. 592
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——— Power to impose on a particular locality . . . . . i. 95
See LEGISLATIVE POWER, 3.

TEMPERANCE ACT OF 1864—*Criminal Procedure-Provincial jurisdiction to pass an ex post facto law.*] Acts of the Ontario Legislature provided that local Boards of Commissioners, and Inspectors appointed by the Lieutenant-Governor, should perform certain duties in their respective localities for the enforcement of the Statute of the late Province of Canada, called "The Temperance Act of 1864;" and that a certain proportion of the expenses attending the execution of these duties should be paid by the municipalities concerned. The Temperance Act provided for prosecutions by private persons, as well as others, for offences against the Act:

Held, that the Ontario enactments were within the competence of the Legislature.

An enactment of an *ex post facto* character by a Provincial Legislature is not void on that ground.—*License Commissioners of Prince Edward* v. *County of Prince Edward* . ii. 678

———2. *Municipal Institutions--Matter of a merely local nature.*] The Temperance Act of 1864, of the late Province of Canada, prohibited the sale of liquors by retail wherever the Act was brought into force, and provided special proceedings and punishments for offences against the Act; the Provincial Legislature of Ontario afterwards enacted that the sale of liquor in such localities should also be a contravention of the Provincial Acts for selling without a license: these Acts provided other punishments and proceedings:

Held, that under the Temperance Act the matter was one of criminal law; and that the legislation of the Provincial Legislature was *ultra vires*.—*Regina* v. *Prittie* . . . ii. 606
Regina v. *Lake* . . . ii. 616

——— 3. *Trade and Commerce, regulation of—B. N. A. Act, s.* 91, *sub-s* 2, *and s.* 129.] The B. N. A. Act in assigning to the Parliament of Canada the exclusive legislative authority over "the regulation of Trade and Commerce," did not thereby repeal "The Temperance Act of 1864," of the late Province of Canada, 27-28 Vict. c. 18, and did not deprive municipal corporations of the power thereby given to prohibit the sale of intoxicating liquors.—*Noel* v. *The Corporation of the County of Richmond.* ii. 246

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——— Power to repeal . ii. 382, 385
See INTOXICATING LIQUORS, 5.

TRADE AND COMMERCE—*Regulation of—Property and civil rights—Fire Insurance contracts, regulation of.*] The power of the Dominion Parliament for the regulation of trade and commerce includes political arrangements in regard to trade, and regulations of trade in matters of inter-provincial concern, and may, perhaps, include general regulations affecting the whole Dominion, but it does not comprehend the power to regulate the contracts of a particular business or trade (such as the business of fire insurance) in a single Province.

An Act of the Province of Ontario to secure uniform conditions in policies of fire insurance was held to be within the power of a Provincial Legislature over "property and civil rights."

Such an Act, so far as relates to insurance on property within the Province, may bind all fire insurance companies, whether incorporated by Dominion, Provincial, Colonial or Foreign authority.

A Dominion Act having required insurance companies to obtain licenses from the Minister of Finance as a condition of their carrying on the business of insurance in the Dominion, neither the Act, nor the fact of a company having obtained such license, was held to withdraw the company from the operation of the Provincial Act.—*Citizens and Queen Insurance Companies* v. *Parsons* . . i. 265

——— 2. *License tax on butchers, power of Provincial Legislature to authorize.*] An Act which authorized the Corporation of the City of Montreal to impose a license tax on butchers keeping stalls or shops in the city for the sale of meat, fish, etc., elsewhere than on the public markets, was held not to be *ultra vires* of the Provincial Legislature, as an interference with trade and commerce.—*Angers* v. *The City of Montreal* . . . ii. 335
Mallette v. *The City of Montreal* ii. 340

——— Bankruptcy and Insolvency ii. 343
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